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Supreme Court of the United States

No. 328.

KANSAS CITY TERMINAL RAILWAY COMPANY, A CORPORATION, PETITIONER,

VS.

FRANK A. THOMPSON, TRUSTEE OF AND FOR ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION, AND ZONA GRAHAM, ADMINISTRATRIX OF THE ESTATE OF THOMAS GRAHAM, DECEASED, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI EN BANC AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

No. .....

KANSAS CITY TERMINAL RAILWAY COMPANY, A CORPORATION, PETITIONER,

VS.

FRANK A. THOMPSON, TRUSTEE OF AND FOR ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION, AND ZONA GRAHAM, ADMINISTRATRIX OF THE ESTATE OF THOMAS GRAHAM, DECEASED, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI EN BANC.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Kansas City Terminal Railway Company, a corporation, respectfully petitions for a writ of certiorari to review the final judgment and decision of the Supreme Court of Missouri *en banc*, the highest court of that state, affirming on appeal a judgment of the Circuit Court of Jackson County, Missouri, for $20,000 in favor of respondent Graham and against petitioner, and reversing the same judgment against respondent Thompson, in

an action brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*), 53 Stat. 1404 (Tr. 450). The judgment and decision of the Supreme Court of Missouri *en banc* became final on July 12, 1948 (Tr. 486), and petitioner has exhausted its remedies in the courts of Missouri.

OPINIONS BELOW.

The style of the case below is "Zona Graham, Administratrix of the Estate of Thomas Graham, deceased, vs. Frank A. Thompson, Trustee of and for St. Louis-San Francisco Railway Company, a corporation, and Kansas City Terminal Railway Company, a corporation" (Tr. 491). The opinion of the Supreme Court of Missouri *en banc* is reported in *Graham* v. *Thompson et al.*, 212 S. W. 2d 770 (not yet officially reported). A copy of the opinion is found on page 451 of the Transcript. The first opinion of the Supreme Court of Missouri *en banc* (before rehearing) is not reported and is found on page 401 of the Transcript. The opinion of Division Two of the Supreme Court of Missouri (where the case was first argued and decided before transfer to the Court *en banc*) is not reported and is found on page 356 of the Transcript.

STATEMENT OF THE MATTERS INVOLVED.

For convenience, the parties hereto will be hereafter identified as follows: petitioner as Terminal, respondent Thompson as Frisco, and respondent Graham as plaintiff.

Thomas Graham was employed by Terminal as a switchman in its yards at Kansas City, Missouri (Tr. 118). While he was engaged in a switching operation in those yards on August 27, 1943, he was struck and killed

by the engine of a passenger train owned and operated by Frisco over tracks owned by Terminal over which Frisco had a contractual right or license to operate (Tr. 22, 45, 116, 119). Graham and both railroads were engaged in interstate commerce at the time of the death. His administratrix sued both Terminal and Frisco in the state court of Missouri under the Federal Employers' Liability Act (Tr. 2), and, pursuant to a jury verdict, obtained a $20,000 judgment against both carriers (Tr. 324).

No negligence against Terminal was ever alleged or proved. The only negligence ever charged or proved was against Frisco alone for the failure of its engineer to warn the deceased after he was actually seen in a position of imminent peril near the track (Tr. 2, 261, 465). Terminal was joined as a defendant (Tr. 3), and the case was submitted to the jury against it (Tr. 260, 274), upon the theory that, because of the license by Terminal to Frisco to use and operate over tracks owned by Terminal (Tr. 40, 46), the Missouri so-called "lessor-lessee" statute made Terminal liable under the Federal Act to the administratrix of its employee for the sole negligence of its licensee. The Missouri statute (Mo. R. S. A., Sec. 5163) is hereinafter set out (p. 10), but in substance, it provides that a railroad leasing or licensing the use of its tracks shall remain liable for the acts of the lessee or licensee and the lessee or licensee shall likewise be liable for the acts of the lessor or licensor.

The carriers' appeal from the judgment was first argued in Division Two of the Supreme Court of Missouri, where the judgment was unanimously affirmed against both railroads (Tr. 355). Presumably because a federal question was involved, the case was transferred to the Court *en banc* (Tr. 392) where, after argument, the judgment was reversed against both carriers (Tr. 400),

one Judge dissenting and one dubitante (Tr. 413). A rehearing was granted (Tr. 449), and upon re-argument, the Court *en banc*, two Judges dissenting (Tr. 466), finally affirmed the judgment against Terminal and reversed it as to Frisco (Tr. 450). This petition to review that judgment of the Court *en banc* follows its denial of Terminal's motion for rehearing (Tr. 486).

Graham was the pinpuller in a Terminal switch crew and was killed at 4:45 p. m. on August 27, 1943 (Tr. 116, 119). The crew assembled for work that morning in Terminal's Mill Street yard in Armourdale, Kansas City, Kansas, and left this yard about 8:00 a. m. with a Diesel switch engine (Tr. 120) and eighteen cars (Tr. 118) for Terminal's Blue River yard in Kansas City, Missouri, to switch various industries in Missouri and to return later to the Mill Street yard (Tr. 118, 141). Graham was in Missouri at the time of his death, standing near mainline Track 2 over which Frisco's passenger train was moving into the Union Station (Tr. 22). He was passing signals to the fireman of his switch engine coming out of a switch track from American Sash and Door Company to mainline Track No. 1 with some cars picked up there, one of which was Southern Pacific No. 82160 (Tr. 119). This car was under a waybill (or order) from American Sash and Door Company to Frisco to move it to its consignee, Home Building Corporation, at Dodson, Missouri (Tr. 64, 65), and was taken by Terminal's switch crew after the accident to Rosedale, Kansas, where it was delivered at 11:00 p. m. to Frisco (Tr. 67), who in turn delivered it by its train to Dodson (Tr. 65, 68).

Graham's crew had also previously picked up in Missouri an empty Pennsylvania car No. 95515 and delivered it after the accident to Frisco in Rosedale, Kansas. This car had originated at North Little Rock, Arkansas, loaded

and consigned to Dascomb-Daniels Lumber Company at Kansas City, Missouri, and had been transported from Brewster, Arkansas, to Kansas City by Frisco and delivered to Terminal for delivery to the consignee on August 19, 1943. After it was delivered empty to Frisco on August 27, it was returned to the Pennsylvania in St. Louis by Frisco's train No. 1528 on August 30, 1943 (Tr. 61, 63, 68-71; Exs. 22, 23).

Both plaintiff and Terminal contended in the trial court and in the court below that the deceased was, by virtue of the Missouri lessor-lessee statute, also an employee of Frisco within the meaning of the Federal Employers' Liability Act. If he was, Terminal then conceded that, by virtue of the same state statute, if Frisco was also negligent, Terminal was liable with it to plaintiff under the Federal Act, although Terminal was itself not negligent. If Frisco was however not liable under the Federal Act, Terminal then claimed that it likewise was not liable under that Act (Tr. 103, 105, 275, 422, 429, 451, 480, 484). Frisco claimed below that the Missouri lessor-lessee statute did not have the effect of making Graham its employee, and that, since Graham was not in fact employed by it, his administratrix had no right of action against it under the Federal Act (*e. g.* Tr. 10, 104, 451). Terminal and Frisco also claimed below that the latter was not negligent, but that issue has now been resolved in plaintiff's favor (Tr. 465), so that the sole negligence of Frisco as the proximate cause of Graham's death has been finally and conclusively established by the jury and by the Supreme Court of Missouri. That court, however, has erroneously held (Tr. 463) that, notwithstanding Terminal's total lack of negligence and Frisco's established negligence, Terminal is nevertheless the only one liable to plaintiff under the Federal Act for the sole negligence of Frisco, because the state statute, held by that court to be superseded by the Federal Act

to relieve Frisco from liability under that Act was, for some undisclosed reason, held not superseded as to Terminal's liability, so that non-negligent Terminal is alone liable for its lessee's sole negligence. This is a very unjust and prejudicial result, for it requires an admittedy non-negligent carrier to pay damages for a death solely caused by the proved negligence of another carrier, and at the same time relieves the negligent carrier from liability under the Federal Act. If the Supreme Court of Missouri is right in saying that the state lessor-lessee statute is superseded by the Federal Act for the purpose of determining Frisco's liability, then the state statute must likewise be superseded by the Federal Act for the purpose of determining Terminal's liability. Absent such a state statute, Terminal was not negligent, and since liability under the Federal Act must be predicated solely upon negligence, plainly Terminal cannot here be liable under that Act. Either both Terminal and Frisco are liable to plaintiff under the Federal Act, or neither is.

The matters involved, therefore, are: (1) whether the Missouri statute should be given effect under the Federal Employers' Liability Act in determining who is an employee of what carrier, and therefore to make Frisco liable under the Federal Act; (2) whether, if so, the proper effect of the state statute in this case is to make Graham the employee of Frisco; and (3) whether, if not, Terminal may nevertheless be held liable under the Federal Act for the sole negligence of Frisco when Terminal itself was not negligent.

JURISDICTION.

This action arose and was determined under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*), 53 Stat. 1404, for damages for the death of a switch-

man employed by Terminal. The Supreme Court of Missouri *en banc* affirmed a $20,000 judgment in favor of his administratrix against Terminal and reversed it against Frisco (Tr. 450), holding that the administratrix had no right of action under the Federal Act against Frisco because the deceased was not in fact employed by it (Tr. 463), and that the administratrix could recover against Terminal under the Federal Act, although it was not negligent (Tr. 465). The jurisdiction of this Court to review the judgment below is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Secs. 344 (a) and (b) and 350), and under Section 1257 (3), of Title 28, United States Code, (Act of June 25, 1948, Public Law 773, 80th Cong., 2nd Sess.). The judgment of the Supreme Court of Missouri *en banc*, the highest court of that state, was entered on May 27, 1948 (Tr. 450), and Terminal's motion for rehearing was denied by that court on July 12, 1948 (Tr. 486), making the judgment final.

The federal question was raised in the trial court by the pleadings (Tr. 2-11), by objections to the evidence (*e. g.* Tr. 42-44, 49, 62, 102-107) and to the instructions to the jury (Tr. 263, 275), and by appropriate post trial motions (Tr. 326, 333, 339). The same matters were raised by assignments of error, argued, and decided in the court below, that court deciding the federal question in favor of Frisco and against Terminal (Tr. 356, 367, 401, 416, 422, 451, 478), so as to deny to Terminal rights to which it was entitled under the Federal Employers' Liability Act.

The cases believed to sustain jurisdiction are:

North Carolina R. R. Co. v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591.

Southern Ry. Co. v. *Lloyd*, 239 U. S. 496, 60 L. Ed. 402.

New York Central R. R. Co. v. *Winfield*, 244 U. S. 147, 61 L. Ed. 1045.

STATUTES INVOLVED.

Section 51 of the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51) and Sec. 5163, Mo. R. S. A., are reproduced in full in Appendix A to the supporting brief. The relevant provisions of the Federal Employers' Liability Act are:

> Every common carrier by rail while engaging in commerce between any of the several States * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow * * and children of such employee; * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * *.

The relevant provisions of the Missouri statute are:

> * * And whenever any * * railroad * * shall lease its road or tracks or any part thereof to any other company or corporation, or shall license or permit any other company or corporation, under any running agreement, to run cars, engines or rolling stock upon its road or track, in this state, the company or corporation so leasing its road, or such part thereof, to such other company or corporation, or so licensing or permitting the use of its road or track by such other company or corporation, shall remain liable for all acts * * claims, demands, judgments and liabilities of the lessee or licensee * * the same as if it (the lessor or licensor) operated the road, or such part thereof, itself; and such lessee or licensee shall likewise be held liable and may * * be sued in all cases and for the same causes, and in the same manner, as if operating its own road: *Provided, however,* that a satisfaction in full of any claim or judgment by either of such corporation or company, shall discharge the other.

> And suit may be brought upon any such claim * * or liability against either the corporation to whom any such * * lease * * has been made, * * or against the corporation so * * leasing * * or against both such corporations, jointly, at the option of such claimant, * *.

QUESTIONS PRESENTED.

1. Can the Missouri statute making the lessor or licensor and the lessee or licensee liable for the negligence of the other properly be given effect under the Federal Employers' Liability Act in this case to make Graham, the actual employee of the licensor, also the employee of the licensee for the purpose of this Federal Act suit, *or* does the Federal Employers' Liability Act require in all circumstances that a contractual relation of employer and employee exist in fact between the carrier and the injured or deceased employee to the complete exclusion of the effect of a state statute otherwise altering the relation?

2. If the state statute can not be given effect in determining who is an employee of what carrier under the Federal Employers' Liability Act, can the non-negligent licensor, be held liable under that Act to its employee for its licensee's sole negligence by the device of enforcing the licensor's own liability created by that state statute and not enforcing the licensee's liability created by the same statute, *or* must not recovery under the Federal Act be predicated solely upon the employer's negligence?

Analysis of the Opinions Below.

This case has had a unique history in the Supreme Court of Missouri, having been there decided three times with three different results, to two of which there were

dissents. It was first argued in Division Two of that Court where, on December 9, 1946, the judgment of the trial court was *affirmed* against both carriers by the three Judges and the three Commissioners in that Division (Tr. 355). The basis of that opinion by Commissioner Barrett (Tr. 356) was that there was no conflict between the Federal Employers' Liability Act and the Missouri lessor-lessee statute, Congress not having said precisely who was an employee of what carrier, so that the Federal Act did not abrogate or supersede the state statute and was not enlarged by giving it proper effect; and that the state statute defined the licensee's liability as that of the licensor's with the effect in this case of making Graham the employee of both carriers. This opinion was ultimately adopted as the dissenting opinion by the two Judges who dissented from the final decision of the majority of the Court *en banc* (Tr. 467). After the decision in Division Two, the case was transferred to the Court *en banc*, presumably because of the federal question involved (Tr. 392), and after argument, a majority of five of that Court, one Judge dissenting and one dubitante (Tr. 413), *reversed* the judgment on September 8, 1947 as to both railroads (Tr. 400). The basis of that majority opinion was that the Federal Employers' Liability Act superseded all state laws with respect to the liability of carriers to their employees, including the Missouri lessor-lessee statute; that under the Federal Act, a contractual relation of employer and employee in fact must exist before a suit could be maintained; and that, since Graham was not in fact employed by Frisco, his administratrix had no right of action under the Federal Act against it (Tr. 401). The majority also held in that opinion (Tr. 412) that, since there was no negligence proved on Terminal's part, it was not liable to plaintiff under the Federal Act because, under that Act, the lia-

bility of the employer was predicated solely upon its own negligence. Thereafter, upon plaintiff's motion, rehearing was granted (Tr. 449), and, after further argument, a third and different result was reached. The judgment was *affirmed* against Terminal and *reversed* against Frisco (Tr. 450), two Judges dissenting (Tr. 466). The same majority's denial of Frisco's liability under the Federal Act was based upon the same grounds as its first opinion—namely, that the Federal Act superseded and abrogated the state lessor-lessee statute and required the existence of a contractual relation of employer and employee in fact, and that since no such relation existed between Graham and Frisco, plaintiff had no right of action under the Federal Act against that carrier (Tr. 463). As to Terminal, the majority of the court *en banc* completely *reversed* the position taken in its first opinion, and held Terminal liable for the judgment, even though it admittedly was itself not negligent (Tr. 463). The precise grounds of this strange result are difficult to perceive. There seem to be two—and both are clearly wrong.

The first ground is apparently found in this conclusion by the court (Tr. 463): "* * Terminal admitted * * that if Frisco was negligent the case was one to be submitted to the jury." This is a bald misstatement of the record and of Terminal's theory of the case. Terminal admitted always, but admitted only, that, *if Frisco were under the Federal Act* as to plaintiff and were also negligent, Terminal was then also liable to plaintiff for Frisco's negligence, because of the state statute. Terminal always claimed (as now) that Frisco was under the Federal Act because of the state statute. But Terminal has never claimed or admitted that it would be liable under the Federal Act if Frisco were not also liable under that

Act. This was made perfectly clear during the trial and should have been clear to the Missouri Supreme Court (*e. g.*, Tr. 422, 429, 480, 484). On the first day of trial Terminal stated to the trial court:

> * * * Terminal's position is that these two railroads are joint employers; the employees of one are the employees of the other, by virtue of the statute and by virtue of the decision of the Supreme Court of the United States (Tr. 103) * * *
>
> *If there is no cause of action against the Frisco, there is no cause of action against the Terminal* (Tr. 105) (Emphasis ours).

Plaintiff's instruction 4 (Tr. 274) authorized the jury to find Terminal liable if they found Frisco negligent. To the giving of this instruction Terminal objected (Tr. 275) because "it * * is an improper statement of the law." Terminal's position always was (*e. g.*, Tr. 29, 103, 105, 275, 422, 429, 480, 484) that both railroads are liable under the Federal Act, or neither is, because the state statute cannot be held ineffective so as to release Frisco and effective to hold Terminal.

The second ground of holding Terminal liable is apparently the court's conception of the law. It declares (Tr. 463): "As Frisco's lessor, Terminal is liable under the Federal Act for the death of its own employee if Frisco was negligent." This purports to be a naked declaration of law, but as a statement of the law of this case, it is clearly wrong. Terminal is not liable under the Federal Act unless it was negligent. It was not negligent—unless it was responsible for Frisco's negligence—and the state statute making it responsible was held to be superseded by the Federal Act. Therefore it should not be liable to plaintiff—unless Frisco is also liable. The state statute is either super-

seded as to both or not superseded as to either. The result reached by the Court below violates the express language of the Federal Act.

Reasons Relied Upon for Issuance of Writ.

1. The Supreme Court of Missouri *en banc* has decided important and substantial questions under the Federal Employers' Liability Act not heretofore precisely decided by this Court and in a manner unquestionably contrary to that in which this Court would have decided them. Those questions are whether an employee of a lessor or licensor railroad may recover damages against the lessee or licensee railroad under the Federal Act for the sole negligence of the lessee or licensee in view of a state statute making the lessor and lessee railroads each liable for the negligence of the other, and if not, whether the employee of the lessor or licensor railroad may recover damages under the Federal Act against the non-negligent lessor or licensor alone for the sole negligence of the lessee or licensee. These questions require an authoritative determination by this Court of the proper effect under the Federal Act to be given rights and liabilities created by state lessor-lessee law which are different from the conventional relations and liabilities of the parties under the Federal Act.

2. The opinion of the Supreme Court of Missouri *en banc* is in direct conflict with controlling decisions of this Court holding that state law may properly create an employer-employee relation for the purposes of suit under the Federal Act where none in fact exist except for state law.

North Carolina R. R. Co. v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591;

Southern Ry. Co. v. *Lloyd*, 239 U. S. 496, 60 L. Ed. 402;

and with the following decisions of the Circuit Courts of Appeals recognizing that state law may properly alter the rights and liabilities of the parties under the Federal Act in lessor-lessee cases:

Kansas City Southern Ry. Co. v. *Nectaux*, (5 Cir.) 26 F. 2d 317.

Stevenson v. *Lake Terminal R. Co.*, (6 Cir.) 42 F. 2d 357.

3. The opinion of the Supreme Court of Missouri *en banc* is in direct conflict with the decisions of the courts of other states holding that state law similar in effect to the Missouri lessor-lessee statute must be enforced under the Federal Act:

Armstrong v. *Chi. & I. R. Co.*, 350 Ill. 426, 183 N. E. 478.

Wilson v. *Terminal R. Ass'n*, 333 Ill. App. 256, 77 N. E. 2d 429.

Barnes v. *Red River & G. R. R. Co.*, 14 La. App. 188, 128 So. 724.

Logan v. *North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959.

Lloyd v. *North Carolina R. R. Co.*, 162 N. C. 485, 78 S. E. 489; 166 N. C. 24, 81 S. E. 1003; 239 U. S. 496, 60 L. Ed. 402.

4. The opinion of the Supreme Court of Missouri *en banc* is in direct conflict with the controlling decisions of this Court holding that recovery under the Federal Act must be predicated solely upon negligence.

Tenant v. *Peoria & U. R. Co.*, 321 U. S. 29, 80 L. Ed. 520.

New York Central R. R. Co. v. *Winfield*, 244 U. S. 145, 61 L. Ed. 1045.

It is essential that the writ be granted to determine important and substantial questions regarding the proper interpretation of the Federal Employers' Liability Act and

its precise effect upon the Missouri lessor-lessee statute and similar state law elsewhere which creates rights and imposes liabilities different from the usual relations of the parties under the Federal Act.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of this Court directed to the Supreme Court of Missouri *en banc* to the end that the judgment of that Court in this case may be reviewed and that upon such review, this Court reverse the judgment below, and for such other and further relief as to this Honorable Court may seem proper.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF CASE.

The facts, the opinions below, the jurisdiction of this Court, and the statutes and the matters involved have been sufficiently described in the petition so that they will not be repeated here.

The parties will be identified in this brief as follows: petitioner as "Terminal," respondent Thompson, Trustee, as "Frisco," and respondent Graham as "plaintiff." Terminal and Frisco will sometimes for convenience be identified as "lessor" and "lessee" because they are so called in the opinions of the Supreme Court of Missouri, and because those terms are frequently used in the reported cases. Technically, however, the real relationship between Terminal and Frisco is that of licensor and licensee of trackage rights under an operating agreement.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Missouri *en banc* erred:

1. In holding that the Federal Employers' Liability Act superseded the Missouri lessor-lessee statute to render it ineffective in this case for the purpose of making the employee of the non-negligent lessor the employee of the negligent lessee, and in holding that Frisco was not liable under the Federal Act.

2. In holding that the Federal Employers' Liability Act requires for the maintenance of a suit under it the

existence of a contractual relation of employer and employee in fact to the exclusion of a state statute altering that relation in a lessor-lessee case.

3. In refusing to give proper effect to the state statute, contrary to *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591, which, we claim, makes Graham the employee of Frisco for the purpose of this suit, and in holding Frisco was not liable under the Federal Act.

4. In holding that the non-negligent lessor was liable to its employee under the Federal Employers' Liability Act for its lessee's sole negligence.

5. In refusing to hold that, if the negligent lessee was not within the Federal Employers' Liability Act as to plaintiff, the non-negligent lessor was likewise not liable under that Act.

6. In nullifying the effect of the state statute in determining the lessee's liability under the Federal Employers' Liability Act and in giving the same statute full effect in determining the lessor's liability under that Act.

SUMMARY OF THE ARGUMENT.

The Missouri Supreme Court, in its final opinion, held that Terminal was liable under the Federal Employers' Liability Act for the negligence of Frisco, although no negligence of Terminal was alleged or proved. At the same time, it held that Frisco was not liable under the Federal Employers' Liability Act, although negligence on its part was alleged, proved and found by the jury. In so holding, the court below necessarily ruled that the Missouri statute is controlling in determining for whose negligence Terminal is responsible under the Federal Act,

but that the Missouri statute is not controlling in determining who is Frisco's employee under the Federal Act. In other words, the court, in the same breath, held that the Missouri statute must be applied in deciding whether Terminal is responsible under the Federal Employers' Liability Act, but that it should not be applied in deciding whether Frisco is responsible under the Federal Employers' Liability Act. These conclusions are contrary to the conclusions of this Court and the decisions of the Circuit Courts of Appeals of two different circuits and to the decisions of several State courts. They are expressly repudiated by the Appellate Court of Illinois in a case involving the Federal Employers' Liability Act and similar State law. It is plain that the conclusions of the Missouri Supreme Court are unsound. Either judgment must go against the negligent defendant if the non-negligent defendant is to be held liable, or, on the other hand, if the negligent defendant is to go free under the Federal Act, then the non-negligent defendant must also go free and the parties be left to their rights under the law of the State of Missouri independently of the Federal Act. The absurdity of the result reached by the Missouri Supreme Court is obvious.

Because of the importance of settling the construction to be given to the Federal Employers' Liability Act and the effect of the various state lessor-lessee statutes in cases arising under the Federal Employers' Liability Act, and, because of the conflict of the decision of the Missouri Supreme Court with the previous decisions of this Court, of the Circuit Courts of Appeals and of the courts of other states certiorari should be granted in this case and the judgment of the Supreme Court of Missouri should be reversed.

ARGUMENT.

I.

The Missouri lessor-lessee statute must be given full effect in determining who is an employee of what carrier under the Federal Employers' Liability Act so that here Graham was the employee of Frisco, and the Supreme Court of Missouri erred in holding that the Federal Act superseded the state statute.

The decision below was grounded upon the broad holding that the Federal Employers' Liability Act supersedes the Missouri lessor-lessee statute, the effect of the claimed application of which in this case was characterized as an effort to "enlarge" and "piece out" a right of action under the Federal Act (Tr. 454, 456). Presumably, had the Court below not thought the state statute repugnant to the Federal Act, it would have agreed that the former's effect otherwise was to make Graham an employee of Frisco. The Court below is wrong in its basic conclusion—as this Court has held. There is no conflict between the Federal Act and the Missouri statute, and the latter must be fully applied in a Federal Act case with the effect here of making the employee of the lessor the employee of the lessee.

North Carolina R. R. Co. v. Zachary Compels This View.

The Federal Employers' Liability Act became effective on April 22, 1908 (45 U. S. C. A., Sec. 51). On February 2, 1914, this Court unanimously held that, if *under state law*, the lessor is responsible for the negligence of the lessee, the employee of the latter is the employee of the

former within the Federal Employers' Liability Act so that he may properly sue the lessor under that Act. *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591. Conversely, if under state law, the lessee is liable for the negligence of the lessor, the employee of the latter is the employee of the former for Federal Act purposes. This Court held in the Zachary case that whether or not the lessor was responsible for the negligence of the lessee was a matter *for state determination* (see also *Chi., B. & Q. R. Co.* v. *Willard*, 220 U. S. 413, 422, 55 L. Ed. 521), and that if local law retained the lessor's liability for the lessee's negligence, the legal consequence under the Federal Act was that the employee of the lessee became the employee of the lessor for the purpose of suit under that Act. Similarly, if local law imposes liability upon the lessee for the negligence of the lessor, the employee of latter may maintain a Federal Act suit against the lessee. In the Zachary case, Burgess, employed by the Southern Railway, was killed by the negligence of his employer, which operated under a lease upon tracks owned by North Carolina Railroad. Under North Carolina law, the lessor was responsible for the negligence of the lessee. His administratrix sued both the Southern and the North Carolina at common law, and the North Carolina contended that the action could only be maintained against it under the Federal Employers' Liability Act. This Court agreed, Mr. Justice Pitney saying, l. c. 258:

> It is plain enough, however, that the effect of the rule thus laid down [local law], especially in view of the grounds upon which it is based, is, that * * such a lease * * constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, * * the lessor is responsible. This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a "common carrier by

> railroad engaging in commerce between the States," and that the deceased was "employed by such carrier in such commerce," within the meaning of the Federal Act; * * (brackets ours).

The accepted doctrine of this case is and has always been that state law—statutory or common, validly existing to prevent the evasion by a railroad of its charter obligations to the public (*Chi., B. & Q. R. Co.* v. *Willard, supra; Clark* v. *Atchison, T. & S. F. Ry. Co.*, 319 Mo. 865, 6 S. W. 2d 954)—by which lessor and lessee railroads each remain liable for the negligence of the other, is to be given its intended effect in determining who is an employee of a lessor or of a lessee carrier in a suit under the Federal Employers' Liability Act. The case is thoroughly embedded in the law of this Court and of the inferior federal courts and of the various state courts, and has heretofore been uniformly applied by all courts without question.

In 1920 Mr. Justice Pitney expressly placed the stamp of this Court's sanction upon its prior opinion in the Zachary case in *Hull* v. *Philadelphia & R. Ry. Co.*, 252 U. S. 475, 64 L. Ed. 670. Hull was generally employed by Western Maryland, but, at the time of his death in Pennsylvania negligently caused by Philadelphia and Reading, was doing switching for that road. There was an agreement between the two carriers permitting each to use the tracks of the other, but there was no state law attaching any legal consequences to such an arrangement. Hull's administratrix sued the Reading under the Federal Act in the Maryland state court, where judgment went against plaintiff on the ground that Hull was not employed by the Reading. This Court affirmed, holding that Hull was not a "loaned servant," and that the bare agreement between the carriers did not make Hull the employee of the Reading. The author of the Zachary opinion said, l. c. 480:

> *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, is cited, but is not in point, *since in that case the relation of the parties was controlled by a dominant rule of local law*, to which the agreement here operative has no analogy (Emphasis ours).

Thus this Court has unequivocally said that the "relation of the parties" (*i. e.*, the rights of the employee and the corresponding liabilities of the carriers for injury or death in interstate transportation) *can be* and *is* "controlled" by a "dominant rule of local law" in the lessor-lessee case. Clearly the Missouri statute, originally enacted in 1870 (*Fleming* v. *Louisiana & M. R. R. Co.*, 263 Mo. 180, 172 S. W. 355) and applied universally by the Missouri courts during the intervening years, is a "dominant rule of local law," to which this Court has at least three times said effect must be given in determining the rights of the parties under the Federal Act.

In 1915 (between the Zachary and the Hull cases) *Southern Ry. Co.* v. *Lloyd*, 239 U. S. 496, 60 L. Ed. 402 was decided. There this Court approved and applied its Zachary decision of one year earlier. Lloyd sued his employer, the Southern, and its lessor, again the North Carolina Railroad, under the Federal Act in the North Carolina state court for the negligence of the Southern. That road removed the case to the federal court on the alleged ground of fraudulent joinder of the lessor. Plaintiff thereupon took a non-suit as to the North Carolina and appealed to the Supreme Court of North Carolina. That court held the removal improper and remanded the case for trial in the state court (162 N. C. 485, 78 S. E. 489). Plaintiff then secured a judgment against both railroads, and the North Carolina Supreme Court affirmed (166 N. C. 24, 81 S. E. 1003). On certiorari, this Court also affirmed, holding *first*, that no right of removal existed in Federal Act cases, regardless of divers-

ity of citizenship or fraudulent joinder, and *second*, that the joinder of the lessor was not fraudulent because it was liable for its lessee's negligence. Mr. Justice Day said l. c. 499:

> * * it is apparent that the plaintiff sought to recover under the Federal Employers' Liability Act, joining both railroad companies upon the theory that the lessor company remained liable under the law of North Carolina upon the cause of action asserted by the plaintiff. See *North Carolina R. R.* v. *Zachary*, 232 U. S. 248. On the face of the petition *a case was made* invoking the jurisdiction of the state court *to recover under the Federal act, because of the negligence charged* (Emphasis ours).

Thus within a six year period this Court three times recognized that state law defining the responsibilities of the lessor and the lessee to the employee of the other *can* and *must* be made effective in Federal Act cases. Before the Zachary case, this Court had sustained the propriety of a state's regulation of lessor and lessee liabilities in this manner (*Chi., B. & Q. R. Co.* v. *Willard, supra*), and the Zachary, Lloyd and Hull cases simply gave proper effect to that regulation under the Federal Act. These cases make it clear that, if a state chooses to guarantee the performance of charter obligations by imposing liability upon a lessor and a lessee each to the other's employee, that liability must be recognized and enforced in Federal Act cases.

The Circuit Courts of Appeals have always applied the Zachary case to give effect to local lessor-lessee law under the Federal Act. *Kansas City Southern Ry. Co.* v. *Nectaux*, (5 Cir.) 26 F. 2d 317, is illustrative. Nectaux, employed by Kansas City Southern, was injured in Louisiana by the negligence of Gulf Coast Line to which Kansas City Southern leased the use of its tracks. Louisi-

ana law permitted recovery by the employee of the lessor against the lessor for the negligence of the lessee. Nectaux' suit under the Federal Act against Kansas City Southern was upheld, Judge Foster saying l. c. 319:

> *A rule of local law imposing liability may be enforced in suits under the Federal Employers' Liability Act. North Carolina R. R. Co. v. Zachary,* 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, Ann. Cases, 1914C., 159.
>
> It is reasonably certain that appellant is the real owner of the road * *; and there could be no doubt that the Gulf Coast Line occupied the position of its licensee * * *so as to bring the employees of appellant within the rule adopted in Louisiana* (Emphasis ours).

The significance of this case is that the Fifth Circuit Court of Appeals felt obligated under the Zachary case to enforce in the Federal Act suit the local law of Louisiana changing the conventional liability of the employer under the Federal Act for its negligence only. If local law can properly be given that effect under the Federal Act, cannot the same local law be also properly given effect to make the employee of the lessor the employee of the lessee? In the one case, the liability of the lessor is extended beyond the conventional requirement of the Federal Act; in the other, the liability of the lessee is likewise increased to the same extent. Local law, if effective at all, should be uniformly effective, and, if ineffective at all, should be uniformly ineffective. It can not be applied to discriminate against the lessor in favor of the lessee.

Stevenson v. *Lake Terminal R. Co.*, (6 Cir.) 42 F. 2d 357, is another recognition of the Zachary case. Stevenson sued the railroad under the Safety Appliance Act for injuries sustained in Ohio resulting from a defective

grab iron. He was employed by National Tube Company, and worked with its cars moving over the railroad's tracks leased to the Tube Company. Plaintiff claimed, among other things, that the use of the tracks by his employer made him the employee of the lessor railroad. This the Sixth Circuit denied on the facts of that case, but it said in effect (l. c. 360) that if Ohio law had made the lessor railroad responsible for the negligence of the lessee Tube Company, plaintiff could have maintained his federal suit against the lessor, because the proper effect of such local law under the Zachary case would have been to make Stevenson the employee of the lessor. The implications of this decision are directly in conflict with the decision below.

The state courts have uniformly given effect to local lessor-lessee law under the Federal Act. The decisions of the Illinois courts are illustrative. Illinois has a lessor-lessee statute similar to that of Missouri. In *Armstrong* v. *Chi. & W. I. R. Co.*, 350 Ill. 426, 183 N. E. 478, the Supreme Court of Illinois, upon the precise authority of the Zachary case, applied the Illinois statute to permit the administratrix of the deceased employee of the lessee to recover under the Federal Act against both the lessee and the lessor for the negligence of the lessor. This case is in direct conflict with the decision below.

The *Armstrong* case was followed by the Appellate Court of Illinois (Fourth District) in *Wilson* v. *Terminal Railroad Association*, 333 Ill. App. 256, 77 N. E. 2d 429 (decided January 26, 1948, which was after the first two opinions of the Missouri Supreme Court in this case had been handed down but before the final decision now sought to be reviewed was rendered). The Appellate Court of Illinois reviewed the *Armstrong* case and also the arguments used to support what developed to be the first

decision of the Missouri Supreme Court *en banc* in this case and definitely rejected the philosophy of the Missouri Supreme Court. The Illinois Appellate court held that a deceased employee of a lessee railroad could recover against the lessor under the Federal Act for the negligence of the lessee, on the ground that the Illinois statute made such employee of the lessee the employee of the lessor for the purpose of that suit. That court said l. c. 433:

> To construe the Federal Employers' Act in the narrow manner contended for by defendant, and apparently adopted in the Missouri Supreme Court, we do not believe is either consistent with the language of the Federal Act, nor of the Congressional intent, * *. We believe that the Federal Act being remedial, should actually be liberally construed rather than simply given lip service to such construction and adopting one which does not apply such principle. *We find no justification for the conclusion that Congress intended the Act to apply only where the formal relationship of master and servant exists* and believe that the Illinois Supreme Court in the Armstrong case adopted a conclusion which is proper under the law and the facts (Emphasis ours).

The appellate courts of Louisiana and North Carolina have also applied local lessor-lessee law in Federal Act cases to make the employee of the lessor or lessee the employee of the other for this purpose (cf. *Barnes* v. *Red River & G. R. R. Co.*, 14 La. App. 188, 128 So. 724; *Logan* v. *North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959; *Lloyd* v. *North Carolina R. R. Co.*, 162 N. C. 485, 78 S. E. 489; 166 N. C. 24, 81 S. E. 1003; 239 U. S. 496, 60 L. Ed. 402.

Heretofore, the Supreme Court of Missouri itself had never thought that the relations between the lessor and lessee created by the Missouri statute were unenforce-

able under the Federal Employers' Liability Act, and the history of this case in Division Two and in *en banc*, as evidenced by the three opinions producing three different results and the dissents, indicates the Court's present uncertainty regarding this subject. Both Divisions of the Supreme Court of Missouri have enforced these state created liabilities in Federal Act cases. *Miller* v. *Terminal R. Ass'n*, 349 Mo. 944, 163 S. W. 2d 1034; *Francis* v. *Terminal R. Ass'n*, 354 Mo. 1232, 193 S. W. 2d 909; *Smith* v. *Thompson*, 182 S. W. 2d 63. The Kansas City Court of Appeals has held a suit by the employee of the lessor against both the lessor and the lessee for the negligence of the lessee to be exclusively under the Federal Act. *Spaw* v. *Kansas City Terminal Ry. Co.*, 198 Mo. App. 552, 201 S. W. 927. The court below purports to distinguish these cases upon their facts, but, whether or not they are so distinguishable, they are indistinguishable in principle, for, in each, the Missouri court applies the *Zachary* case to permit the lessor-lessee statute to fix the rights and liabilities of the parties under the Federal Act. The Missouri courts have always construed the state statute to make the lessor and lessee liable for the negligence of the other and the employees of the one the employees of the other, even in Federal Act cases, as these four Missouri cases show. The court below did not overrule these cases or in any way question their construction of the Missouri statute. The court below did not construe, or purport to construe, the Missouri statute in a manner any different from its previous accepted construction. What it held was that, regardless of the accepted construction of the Missouri statute, its effect was excluded by the Federal Act in determining rights and liabilities under that Act. Thus the federal question is sharply presented. But even though the court below said the effect of the Missouri statute was not to be taken into account in this case, and

while it did not give it effect in determining Frisco's liability, it blandly ignored its own pronouncement when it came to determine Terminal's liability and judged its liability by the Federal Act *and* the Missouri statute. This, we claim, was prejudicial error.

The Fallacious Reasons of the Court Below.

The court below bottoms its conclusion that the state statute is superseded by the Federal Employers' Liability Act upon three grounds: (1) the broad language of such cases as *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, 61 L. Ed. 1045, and *Chi., M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 70 L. Ed. 1041, to the general effect that by the Federal Act, Congress took exclusive possession of the field of carriers' liability to employees in interstate commerce, compels the conclusion here that the Missouri statute was included among those state laws superseded by that Act ; (2) *North Carolina R. R. Co.* v. *Zachary* does not really hold what it purports to hold, because the North Carolina law relied upon in that case actually was not what this Court said it was; and (3) this case "is ruled by" such cases as *Hull* v. *Phila. & R. Ry. Co., supra* (252 U. S. 475, 64 L. Ed. 670), and *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, 59 L. Ed. 849 (Tr. 461). We shall analyze these reasons as briefly as possible and demonstrate them to be wholly without merit.

1. Elementary law recognizing the paramount power of Congress in the field of interstate transportation and the general legal consequences of the exercise of that power upon state laws by the enactment of the Federal Employers' Liability Act is scarcely any real aid here in determining whether this particular state statute should be given effect. State laws are sustained under federal legislation over interstate commerce unless there is a

plain and clear conflict. See *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, 89 L. Ed. 1915; *Gilvary* v. *Cuyahoga V. Ry. Co.*, 292 U. S. 57, 78 L. Ed. 1123; *Woodward* v. *Southern Pac. Co.*, 35 Cal. App. 2d 130, 94 Pac. 2d 1028 (cert. den. 309 U. S. 670, 84 L. Ed. 1016). There are instances in this and other Courts where state laws have been given effect under the Federal Act (*e. g. Frese* v. *Chi., B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131; *Dickinson* v. *Stiles*, 246 U. S. 631, 62 L. Ed. 908; *O'Connor* v. *Chi., M. & St. P. Ry. Co.*, 163 Wis. 653, 158 N. W. 343; aff'd 248 U. S. 536, 63 L. Ed. 408; *St. Louis, I. M. & S. R. Co.* v. *McNamara*, 91 Ark. 515, 122 S. W. 102), and certainly the Zachary case and the many cases heretofore cited applying it are perfect illustrations, *in the very circumstances of this case*, of the harmonious existence of an effective "local law" under the Federal Act. This case, we believe, should be determined by whether the Zachary case and its underlying philosophy is right or wrong. If it is right—as we believe it to be—valid state lessor-lessee law is simply another example of a particular phase of the employee-carrier relation upon which Congress has not specifically legislated so that the matter is left open for the application of appropriate state laws. For this reason, we disregard broad statements respecting the effect generally of the Federal Employers' Liability Act upon state laws, except to point out that, if these generalities had been faithfully applied by the court below, it could never have reached the strange result of holding that the state statute was superseded for the purpose of determining Frisco's liability but not superseded for the purpose of determining Terminal's liability. A logical application in this case of the doctrine that all state laws were superseded by the Federal Act would require here a finding that Terminal was not liable under the Federal Act because the state statute making it negligent was superseded by the Federal Act.

2. Of *North Carolina R. R. Co.* v. *Zachary*, the Court below said:

> Analysis of that case demonstrates it did not turn upon a question of similar or dominant local law * * (Tr. 459).
>
> * * what is referred to in the Zachary opinion as a "local law" * * had nothing at all to do with whether Zachary's intestate * * was also an employee of North Carolina Railroad Company * * (Tr. 460).
>
> * * * that case is no authority here (Tr. 461).

These conclusions are wrong. *Logan* v. *North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959, was the case relied upon by this Court in the Zachary case to ascertain what the local law of North Carolina was. That case held, precisely and unequivocally, just what this Court said it held —that in North Carolina, the lessor was responsible for the negligence of its lessee. The Supreme Court of North Carolina recognized that exact holding of the Logan case when the Zachary case was before it (*Zachary* v. *North Carolina R. R. Co.*, 156 N. C. 496, 72 S. E. 858). The declaration of North Carolina law in the Logan case was grounded on common law principles—not a statute, and *Gooch* v. *McGee*, 83 N. C. 59, 35 Am. Rep. 558, and *State* v. *Rives*, (1844) 5 Ired. (Law), N. C., 297, and the North Carolina statute discussed in those two cases had nothing at all to do with the decision in the Logan case. The Court below was right when it said (Tr. 460) "the opinion in the Logan case was not based on a statute at all." But the fact that no statute was involved does not destroy or weaken or in any way affect the plain authority of the Logan case as a pronouncement of the North Carolina law. Local law enforceable under the Federal Act may either be statutory or common law. In North Carolina, it was common law; in Missouri, it is statutory. The net result in each state is that the lessor is responsible to the em-

ployees of the lessee for the negligence of the lessee, and the lessee is also responsible to the employees of the lessor for the negligence of the lessor, so that the employees of the one are the employees of the other. If that is the state law, this Court has said it must be given effect in Federal Act cases to permit suit against either the lessor or lessee by one not in fact employed by it.

A simple statement of the Logan case makes it plain that the Court below mistakenly interpreted it. The North Carolina Supreme Court specifically held that in that state, a lessor was liable for the negligence of the lessee, not because of any statute, but solely because of common law principles arising out of the lessor's charter obligations to the state. Logan was employed by Richmond and Danville, and was hurt by the alleged negligence of that road while working upon tracks owned by the North Carolina and leased to the Richmond. He sued the North Carolina alone at common law. The trial court sustained a demurrer to the petition, but the North Carolina Supreme Court reversed, holding that the law in that state was that the lessor was responsible to the employees of its lessee for the negligence of the lessee, and therefore a cause of action against the lessor was stated. The Court said:

> * * we * * rest our ruling upon the ground that the original grant of extraordinary privileges still carries with it a correlative obligation to perform the duties which were in contemplation of the State and the corporation when the charter was enacted (l. c. 961).
>
> * * if we apply the test—which we hold to be the true one—that the liability of the lessor grows out of the duty imposed with the privileges in the first instance, the same reason is found to exist for holding it liable to servants of the lessee for injuries sustained by them * * (l. c. 962).

Thus the Logan case categorically declares the North Carolina law, and this Court unhesitatingly gave that law full effect in a Federal Act case to hold the lessor liable thereunder to one not in fact employed by it. The same effect should be given the Missouri statute here to hold the lessee liable to one not in fact employed by it.

The Lloyd cases eighteen years later dispel forever any doubt about the holding in the Logan case and what the local law of North Carolina was. In those cases, the North Carolina Supreme Court again states and applies the rule of the lessor's liability declared in the Logan case, and corroborates this Court's view of what the North Carolina law was at the time of the Zachary case. Lloyd was employed by the Southern, and sued it and its lessor, the North Carolina, under the Federal Act in the North Carolina state court for the negligence of the Southern. *Lloyd* v. *North Carolina R. R. Co.*, 162 N. C. 485, 78 S. E. 489. The Southern removed the case to the federal court on the alleged ground of fraudulent joinder of the North Carolina. Plaintiff thereupon took a non-suit as to it, and appealed to the Supreme Court of North Carolina. It held the removal improper, because, under the Logan case, a cause of action was stated against the lessor. After judgment for plaintiff against both defendants in the state court, defendant appealed to the North Carolina Supreme Court and it affirmed (*Lloyd* v. *Southern Ry. Co.*, 166 N. C. 24, 81 S. E. 1003), holding that the lessor was responsible for the lessee's negligence, and that the Zachary case in this Court was direct authority for the lessor's liability under the Federal Act. On certiorari, this Court affirmed (*Southern Ry. Co.* v. *Lloyd*, 239 U. S. 496, 60 L. Ed. 402), thus a second time giving full effect to North Carolina lessor-lessee law under the Federal Act, and holding that, since that state law made the lessor liable for the lessee's negligence, the joinder of the lessor

was not fraudulent. Thus both before and after the decision of this Court in the Zachary case, North Carolina law *did* make the lessor responsible for the negligence of the lessee and *did* make the employee of the latter the employee of the former for the purpose of a Federal Act suit, and the court below is wrong when it says (Tr. 460) that the "local law" of the Zachary opinion had "nothing at all to do with whether Burgess was the employee of the lessor."

3. The court below said this case is "ruled by" *Hull* v. *Phila. & R. Ry. Co.*, *supra* (252 U. S. 475, 64 L. Ed. 670), and *Robinson* v. *Baltimore & Ohio R. Co.*, *supra* (237 U. S. 84, 59 L. Ed. 849) (Tr. 469). In neither of those cases was there a "dominant rule of local law" (the Hull case, l. c. 480). The Hull case involved a lease, but neither Pennsylvania nor Maryland law made the lessor or the lessee liable for the negligence of the other. The absence of this factor took the case out of the rule of the Zachary case, and required the application of the conventional test to determine the employer-employee relation. Neither a lease nor local law was present in the Robinson case. There a porter employed by the Pullman Company was held not to be an employee of the carrier for the purpose of Federal Act suit. Both cases contain general language indicating that the words "employee" and "employed" in the Federal Employers' Liability Act are used in their natural sense and are intended to describe the conventional relation of employer and employee. This may be usually true, but, in view of the Zachary decision (which this Court in the Hull case said was not there in point because in the Hull case there was involved no "dominant rule of local law"), these words in the Federal Act are not to be so conventionally construed in a lessor-lessee case. Compare *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 120-129, 88 L. Ed. 1170. We fail

to see how the court below concluded that Congress intended an employment in fact in the lessor-lessee case too, when the Zachary case (and others like it) plainly hold that, if by state law the carriers' liabilities as lessor and as lessee to the other's employees are other than normal, that difference must be given effect under the Federal Act. There is nothing in either the Hull or Robinson cases warranting any contrary conclusion.

For all the foregoing reasons, the court below erred in not applying *North Carolina R. R. Co.* v. *Zachary*, and erred in refusing to give the effect to the Missouri statute of making Graham the employee of Frisco for the purpose of this case, so that the court below improperly reversed the judgment on this ground as to Frisco.

II.

If Frisco is not liable under the Federal Act, neither is Terminal, and the Supreme Court of Missouri erred in holding Terminal liable under that Act when admittedly it was not negligent.

The Court below reached the grotesque result of finding Frisco not liable, even though it was proved negligent, and of finding Terminal liable, even though it was proved not negligent (Tr. 463, 465). The basis was that the state statute was ineffective (because superseded) in determining the lessee's liability, but effective (because not superseded) in determining the lessor's liability. This is an arbitrary and discriminatory determination of Terminal's federal rights, particularly when the court below itself said (Tr. 454) that "the Federal Act is controlling, exclusive and supreme with respect to which railroads should be liable thereunder." What the court actually held was that the Federal Act was "controlling, exclusive and supreme" with respect to Frisco's

liability, but not so with respect to Terminal's. A state statute changing the conventional liabilities of the lessor and the lessee to the employee of the other is either superseded for the purpose of determining the liabilities of both, or is not superseded for the purpose of determining the liabilities of either.

Liability under the Federal Act is predicated solely upon negligence. *Tenant* v. *Peoria & U. R. Co.*, 321 U. S. 29, 80 L. Ed. 520; *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147, 61 L. Ed. 1045. Terminal was not negligent, and therefore is not liable to plaintiff—if Frisco is not. Either both railroads are liable, or neither is, because the state statute changing their conventional liability is either good as to both or bad as to both. It cannot be ineffective as to one and effective as to the other, the court below notwithstanding.

Kansas City Southern Ry. Co. v. *Nectaux, supra* (26 F. 2d 317), *Miller* v. *Terminal R. Ass'n, supra* (349 Mo. 944, 163 S. W. 2d 1034), and *Francis* v. *Terminal R. Ass'n, supra* (354 Mo. 1232, 193 S. W. 2d 909), are three cases in each of which the courts applied local law under the Federal Act to hold a non-negligent lessor liable under that Act to its employee for the sole negligence of its lessee. In none of those cases was the question involved whether the same local law could be applied to make the employee of the lessor the employee of the lessee for Federal Act purposes. However, if local law can be properly invoked to make an employing carrier liable under the Federal Act when it was not negligent (and therefore not otherwise liable), local law can also be properly invoked to make a lessee carrier liable under the Federal Act when it did not in fact employ the deceased (and therefore was not otherwise liable). If the plain requirements of the Federal Act can be altered by state law in the one respect so as to

predicate a defendant's liability upon the negligence of another, they can also be altered in the other respect so as to make a negligent defendant liable to one not directly employed by it.

The assumption of the court below (Tr. 463) that Terminal admitted that, regardless of Frisco's liability, if Frisco were negligent, Terminal was liable, is simply unfounded in the record. Terminal's position in this respect was stated to the trial court:

> * * Terminal's position is that these two railroads are joint employers; the employees of one are the employees of the other, by virtue of the statute and by virtue of the decision of the Supreme Court of the United States (Tr. 103).
>
> * * *If there is no cause of action against the Frisco, there is no cause of action against the Terminal* (Tr. 105).
>
> * * Terminal * * objects to the giving of Instruction No. 4 [authorizing a finding of Terminal's liability if Frisco were negligent] for the reason it * * is an improper statement of the law (Tr. 275). (Emphasis and brackets ours).

This position was consistently maintained throughout the trial and before the court below. Petitioner has always claimed—and now claims—that Graham was a joint employee of both carriers, and has always conceded—and now concedes—that if so, and if Frisco was negligent, Terminal is also liable to plaintiff, although it was not itself negligent, because of the state statute, for if that statute is effective against Frisco, it is effective against Terminal (Tr. 422, 429, 480, 484). Petitioner has never conceded that it could be liable, if Frisco were not liable. But the court below has, in one breath, held the state law ineffective as to the Frisco, and effective as to Terminal—a result with which it seems perfectly obvious Terminal never agreed.

Because petitioner has been required to respond in damages under the Federal Act without a finding of its negligence, it has been deprived of its substantial rights under the Federal Act, and this Court should review and reverse the judgment below for that reason.

CONCLUSION.

We urge this Court to grant the writ because of the conflict with other decisions, because of the importance of a proper construction of the Federal Employers' Liability Act in view of the state law, and because petitioner has been deprived of its rights under the Federal Employers' Liability Act by the judgment of the Supreme Court of Missouri *en banc* in that:

(1) that court erroneously refused to give effect to the Missouri lessor-lessee statute under the Federal Employers' Liability Act, thereby improperly finding Frisco not liable under that Act; and,

(2) that court erroneously found Terminal liable under the Federal Act although admittedly it was itself not negligent.

Respectfully submitted,

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APPENDIX "A."

45 U. S. C. A., Section 51:

Sec. 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

R. S. A., Mo., 1939, Section 5163:

Sec. 5163. Liability of companies for debts, etc., after sale — consolidation — lease — assignment — suits for recovery authorized. — Whenever any railroad, street railway, terminal or other railway corporation owning, operating, maintaining, managing or running any railway or railroad, of any kind whatsoever, in this state, shall sell, transfer, consolidate, lease or assign any such railroad, or railway, or any part thereof or interest therein, to or with any other railroad, railway, corporation, person or persons, such railroad, railway, corporation, person or persons, and its or their successors and assigns, shall take and hold the same subject to the payment of all judgments, claims, debts, liens and liabilities existing against such railroad, street railway, terminal or other railway corporation, at the time of the sale, transfer, consolidation, lease or assignment thereof. And whenever any such railroad, street railway or other railway company or corporation, or any receiver thereof, shall lease its road or tracks or any part thereof to any other company or corporation, or shall license or permit any other company or corporation, under any running agreement, to run cars, engines or rolling stock upon its road or track, in this state, the company or corporation so leasing its road, or such part thereof, to such other company or corporation, or so licensing or permitting the use of its road or track by such other company or corporation, shall remain liable for all acts, debts, claims, demands, judgments and liabilities of the lessee or licensee; or any sublessee or sublicensee, company or corporation, the same as if it (the lessor or licensor) operated the road, or such part thereof, itself; and such lessee or licensee shall likewise be held liable and may sue and be sued in all cases and for the same causes, and in the same manner, as if operating its own road: *Provided, however,* that a satisfaction in full of any claim or judgment by either of such corporation or company, shall discharge the other. And suit may be brought upon any such claim, debt, lien or

ability against either the corporation to whom any such sale, transfer, lease, or assignment has been made, or with which such consolidation has been had, or against the corporation so selling, transferring, leasing, consolidating or assigning, or against both such corporations, jointly, at the option of such claimant, and if any suit shall be pending against the corporation so selling, transferring, leasing, assigning, at the time of any such sale, transfer, consolidation, lease or assignment, the plaintiff therein may, at his option, and upon motion, have the corporation or person so purchasing, receiving, acquiring or taking, made a party defendant jointly with the other defendant, but such plaintiff's failure to have such corporation made a defendant in the case shall not in any manner prevent or bar such plaintiff from enforcing any judgment obtained in such suit against the corporation so acquiring, purchasing or taking such railroad, or railway, or part thereof, as above provided. And for the purposes of jurisdiction and service of process, the servants, agents, employees, officers and offices of either of such corporations or person shall be held to be the agents, servants, employees, officers and offices of both, and service upon the agent, officer or employee of either corporation, shall be held and deemed sufficient and valid service upon both of such corporations (R. S., 1929, Sec. 4690).

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Supreme Court of the United States

No. 328.

KANSAS CITY TERMINAL RAILWAY COMPANY, A CORPORATION, PETITIONER,

VS.

FRANK A. THOMPSON, TRUSTEE OF AND FOR ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION, AND ZONA GRAHAM, ADMINISTRATRIX OF THE ESTATE OF THOMAS GRAHAM, DECEASED, RESPONDENTS.

BRIEF OF PETITIONER IN REPLY TO RESPONDENTS' BRIEFS.

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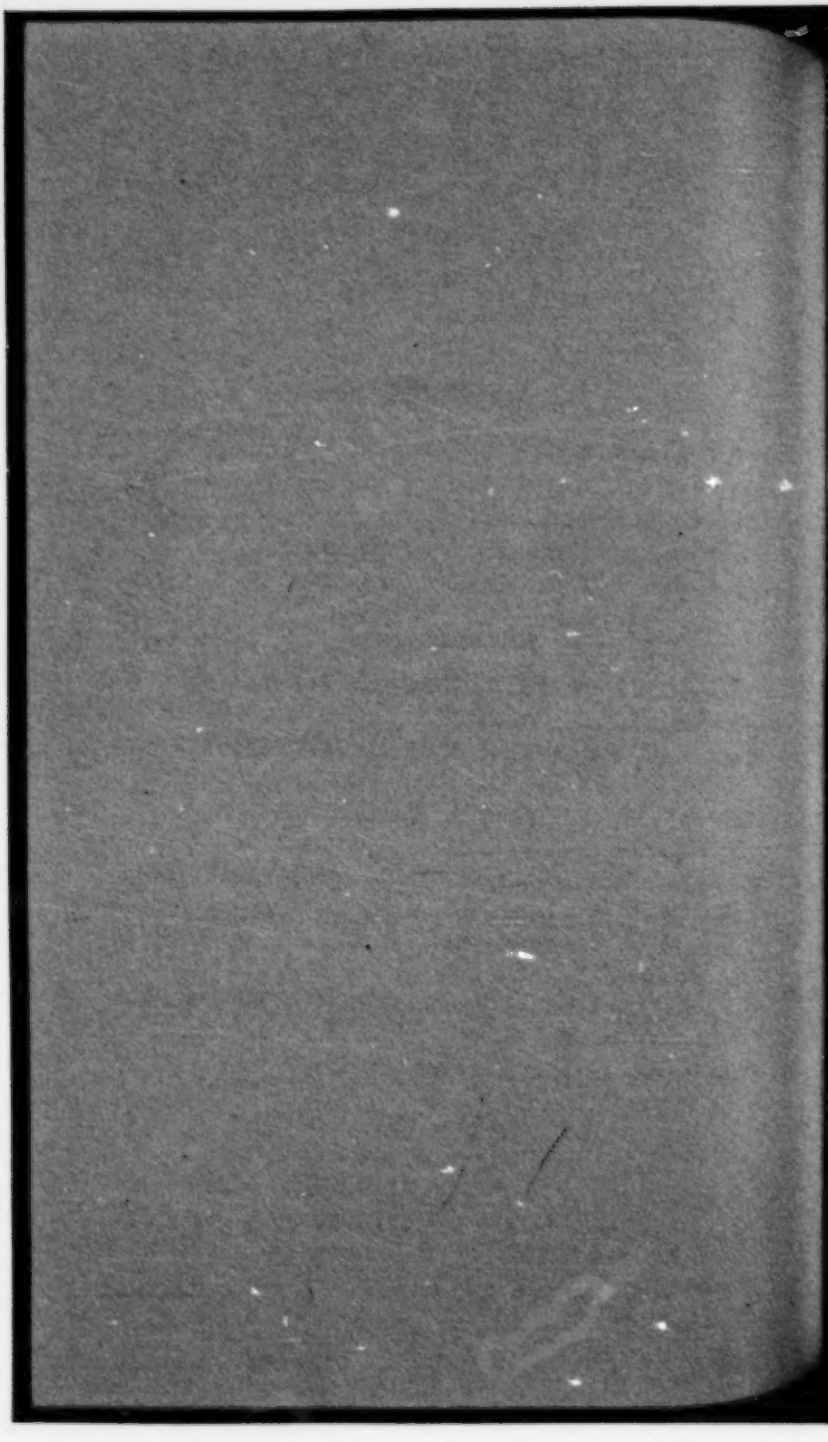

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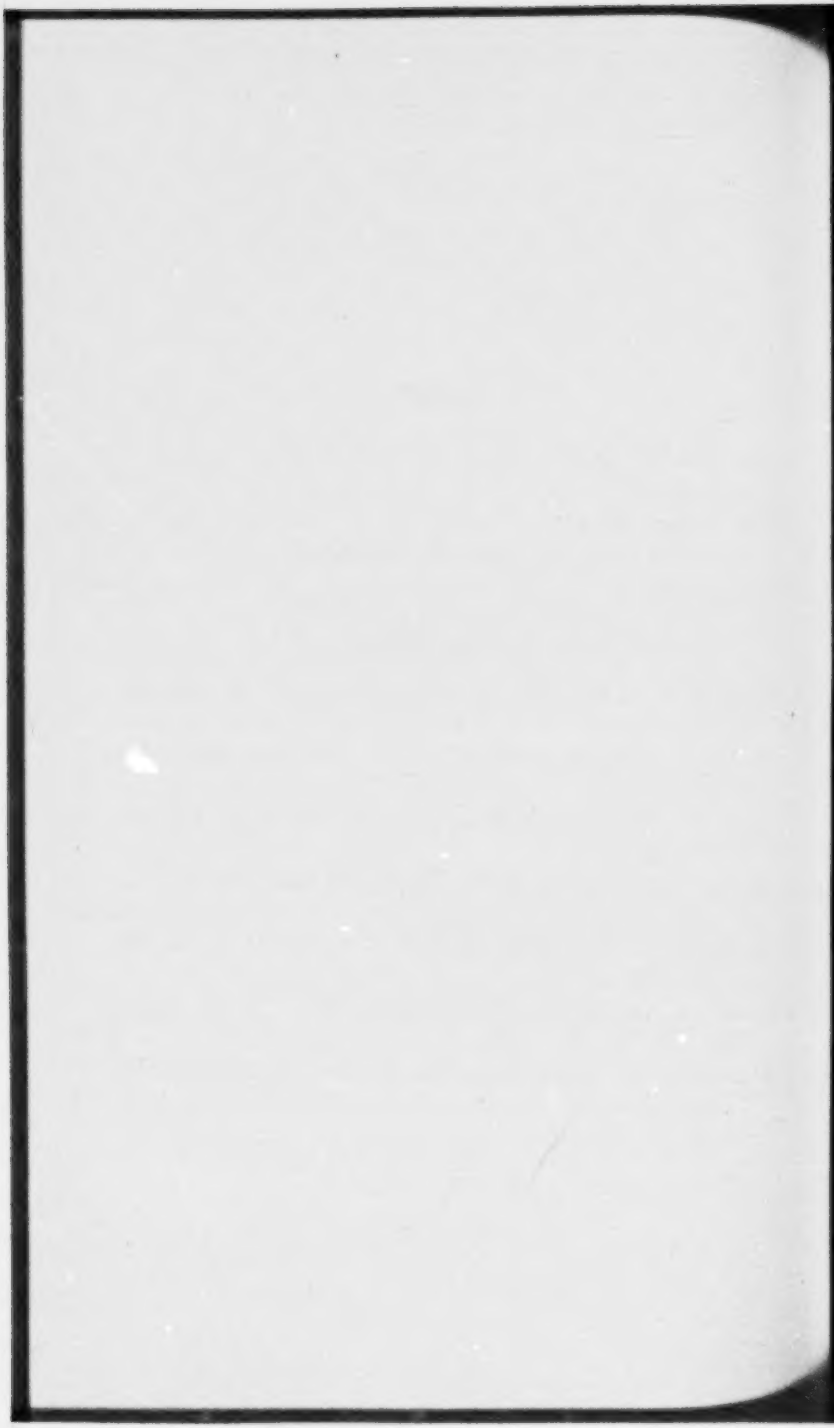

Supreme Court of the United States

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BRIEF OF PETITIONER IN REPLY TO RESPONDENTS' BRIEFS.

The outstanding characteristic of the briefs of respondents is their failure even to attempt to defend or justify the utterly inconsistent decision of the Missouri Supreme Court that the Missouri lessor lessee statute was superseded and rendered ineffective by the Federal Act for the purpose of determining Frisco's liability thereunder but not so for the purpose of determining Terminal's liability. That precise holding is the kernel of the problem which petitioner has requested this Court to review and decide, and respondents have completely ignored

it. Instead, they resist the petition upon other, and unimportant, grounds. These we briefly consider.

The Federal Question.

Plaintiff argues (pp. 5-15) that the federal question was not properly raised below and was not actually decided by the Missouri Supreme Court. She is mistaken. To demonstrate this, a simple restatement of some of the matter appearing in our petition and original brief is required.

Plaintiff's petition alleged (Tr. 2-8) that Graham was employed by Terminal; that it owned the track over which the Frisco train was being operated; that the use of the track was licensed by Terminal to Frisco; that Frisco alone was negligent; and that "under the law of the State of Missouri" Terminal, as the licensor, was liable *under the Federal Act* to plaintiff for the negligence of Frisco. Terminal's answer (Tr. 11) denied all of these allegations. Thus the federal question was first raised in the pleadings and was properly preserved throughout the trial and the appeal in the Supreme Court of Missouri. Terminal's position was (and is) that it was liable under the Federal Act if Frisco was liable under that Act, but was not if Frisco was not (Tr. 103, 105). Terminal objected to plaintiff's submission authorizing a verdict against it if the jury found Frisco negligent (Tr. 275). The case was submitted to the jury against both carriers under the Federal Act, and that submission was affirmed by Division Two of the Missouri Supreme Court (Tr. 355). The Court *en banc* the first time reversed the judgment against both railroads (R. 400). Because these results in the trial court and in Division Two and in the court *en banc* the first time were all consistent with Terminal's position, there was never any decision upon the federal question to which Terminal could object until the second decision of the

court *en banc*. That decision on rehearing, reversing the judgment against Frisco and affirming it against Terminal, was the *first* time the decision on the federal question adversely affected Terminal, and its motion for rehearing and this petition immediately followed. Plaintiff's present claim of the untimely raising of the federal question is without merit.

The foundation of plaintiff's present argument that the court below decided no federal question appears in what that court, and respondents now, characterize as Terminal's "trial and appeal theory." We had thought that we had sufficiently shown in our original brief the complete absence of any support in the record for such a claim, but, because both plaintiff and Frisco monotonously repeat it, we state again the reasons why such a claim is unfounded. Terminal always admitted, but admitted only, that it was liable to plaintiff under the Federal Act if Frisco was liable under that Act. Terminal always claimed that if Frisco was not liable under the Federal Act, it was not either. The broad conclusion by the court below and by respondents now that Terminal admitted that if Frisco was negligent, Terminal was liable, is simply incorrect.

Furthermore, that is not the ground upon which the Missouri Supreme Court put Terminal's liability. It categorically declared the law to be (Tr. 463) "as Frisco's lessor, Terminal is liable under the Federal Act for the death of its own employee if Frisco was negligent." It is the application here of this purported rule of law which sharply presents the federal question. How can non-negligent Terminal be liable under the Federal Act for Frisco's negligence solely by virtue of a state statute held by the court to have been superseded by the Federal Act as to Frisco's liability? If, as the Missouri Supreme Court

said (Tr. 454), "the Federal Act is controlling, exclusive and supreme with respect to which railroads shall be held liable thereunder," then the Missouri statute must necessarily be just as ineffective in determining Terminal's liability as it was held to be in determining Frisco's liability. If the Federal Act exclusively measures Frisco's liability, it must also exclusively measure Terminal's liability. But the Missouri Supreme Court did not so measure Terminal's liability. It applied to it the state statute also. Thus was the federal question decided adversely to Terminal. Contrary to plaintiff's argument (pp. 13, 15), the real legal basis of the court's finding of Terminal's liability was its direct holding that the Federal Act superseded the Missouri statute as to Frisco but not as to Terminal.

The Conflict.

Respondents claim (plaintiff's brief, pp. 15-20; Frisco's brief, pp. 13-14) that the decision below is not in conflict with the decision of this or any other court. We observe:

1. Such an argument necessarily admits, and conclusively demonstrates, what we assert in our original brief (p. 28)—namely, that the Missouri Supreme Court did not construe the Missouri statute one iota different from its previous accepted construction. It has always been construed by the Missouri courts to make the lessor and lessee liable for the negligence of the other (as the Missouri cases on page 28 of our original brief show), and that same construction was not questioned or denied by the court below in this case. In fact, that court never even bothered to construe the state statute at all. It simply held that, notwithstanding the accepted construction and regardless of what it meant, no effect could be

given it in this case in determining Frisco's liability because the Federal Act is "controlling, exclusive and supreme with respect to which railroads shall be held liable thereunder" (Tr. 454), but in ascertaining Terminal's liability, it ignored what it had just held, and gave full effect to the state law under the Federal Act. Whether that conclusion is right or wrong is all we ask this Court to decide.

2. The Zachary and the Lloyd cases in this Court and the various federal and state court cases cited in our petition and original brief and in plaintiff's brief (pp. 15-20) are directly in conflict with the holding of the Missouri Supreme Court that the Federal Act requires the existence in fact of a contractual relation between the employer and employee. An employee of the lessor is just as much an employee of the lessee for the purpose of Federal Act suits as an employee of the lessee is an employee of the lessor. Because the Missouri Supreme Court has erroneously construed and failed to apply the Federal Act consistently as to both railroads here, Terminal will be required either to pay a judgment which neither it nor Frisco should pay, or one for which Frisco should reimburse Terminal.

3. Whether or not the reported cases are in conflict with the decision below upon their facts, they are certainly in conflict upon principle, for in each of those cases, this Court and the inferior federal courts and the various state courts have uniformly enforced in Federal Act cases lessor and lessee liabilities created by state law different from their usual liabilities under the Federal Act. That principle is firmly established by all of these cases but was repudiated by the Missouri Supreme Court when it freed Frisco. Not content with this departure from recognized legal principles, that court completely

left the rails by ignoring its own holding that "the Federal Act is controlling, exclusive and supreme with respect to which railroads shall be held liable thereunder" and finding Terminal liable solely because of the very state statute it said was superseded. All of the cases are clearly contrary to such a result.

The "Only Result."

Plaintiff claims (pp. 20-29) that in freeing Frisco and in holding Terminal liable, the Missouri Supreme Court reached "the only result which could ever be reached in this case" because (1) Frisco was made Terminal's agent by the state statute, and the Federal Act makes the carrier responsible for the negligence of its agent, (2) the liability of Terminal for the negligence of Frisco was a matter of state law, and (3) Terminal is a joint tort feasor, and therefore recovery against it is proper. These claims are without merit.

1. If Terminal were itself negligent, it would be liable to plaintiff under the Federal Act. Admittedly it was not. If it is liable for Frisco's negligence, it is only so liable by virtue of the state statute. Nothing in the Federal Act makes it liable, for that Act predicates recovery upon the defendant's negligence. But if, as the Missouri Supreme Court held, the Federal Act supersedes the state statute, then the only conceivable basis of Terminal's liability here is gone. Therefore it cannot be liable, because it was itself not negligent and because it is not responsible for Frisco's negligence. Plaintiff's argument on page 22 assumes an effective state statute. But the court below held that statute ineffective, so that Frisco cannot, by that statute, be the Terminal's "agent." Absent the state statute, there is no basis for claiming any agency. Clearly the operating agreement between Ter-

minal and Frisco does not have this effect; it does not impose any "joint" or any other kind of liability upon Terminal for the acts of Frisco. *Hull* v. *Philadelphia & R. Ry. Co.*, 252 U. S. 475, 64 L. Ed. 670; *Robinson* v. *Baltimore & O. R. Co.*, 237 U. S. 84, 59 L. Ed. 849; *Chicago & A. R. Co.* v. *Wagner*, 239 U. S. 452, 60 L. Ed. 379; *Stevenson* v. *Lake Terminal R. Co.*, (6 Cir.) 42 F. 2d 357.

2. The questions whether or not Graham was an employee of Frisco and whether or not the Missouri statute generally makes the lessor liable for the lessee's negligence were, as plaintiff claims (pp. 23-25), exclusively questions of state law. Whether or not the state statute should and could be so construed was purely a matter of interpretation of the local statute, with which this Court has no concern. But that is not the question here. The Missouri Supreme Court did not purport to construe the state statute. It held that, regardless of the construction of that statute, its effect (whatever it might be) was superseded by the Federal Act as to Frisco but not as to Terminal. The propriety of that construction of a federal statute holding a state law bad under it as to Frisco but good under it as to Terminal is the question in this petition. That certainly cannot be answered by the assertion of the simple proposition that the construction of the state statute is a matter for state court determination. Clearly the proper relation between the Federal Act and the Missouri statute is a federal matter which this Court should decide.

Plaintiff misstates (p. 24) the effect of an excerpt from one of our briefs in the Missouri Supreme Court *en banc*. The remarks quoted on page 24 were made in response to the claim of *amicus curiae*, Terminal Railroad Association of St. Louis, that the construction and effect

of the Missouri statute were questions upon which the opinions of the federal courts were controlling. Of course they are not, and we say again here what we said there. The construction and effect of the Missouri statute are solely matters for the Missouri Supreme Court, but, when that court goes further, as it has, and holds that a federal statute supersedes the state law as to a lessee railroad but not as to the lessor railroad, an important federal question of the proper relation of the two laws, federal and state, is raised and should be decided.

3. Common law liabilities of joint tort feasors have no place in this case. The problem here is the effect to be given federal and state statutes. Terminal concedes "joint" liability (under the state statute) only if Frisco is liable under the Federal Act. Plaintiff's argument on pages 25-29 is wholly beside the point.

Contrary to plaintiff's claim, the Missouri Supreme Court reached the only result which cannot be sustained. Either both railroads are liable under the Federal Act (as Division Two held (Tr. 356)) or neither is (as the Court *en banc* first held (Tr. 401)). One or the other cannot be liable alone.

Construction of the Missouri Statute.

Frisco claims (pp. 8-12, 13-14) that the Missouri statute has never been construed by a Missouri court to make the employee of the lessor the employee of the lessee for the purpose of Federal Act suit. Even if this is true, it is scarcely any reason for denying the issuance of the writ. The error of the Missouri Supreme Court was its decision that the Federal Act exclusively governed the rights of Frisco but not the rights of Terminal. The propriety of this ruling does not depend upon whether or not the Mis-

souri statute makes Graham Frisco's employee. The court below did not even decide that question.

But is it true that the state statute does not make the employee of the lessor the employee of the lessee? Frisco says yes, because, it claims, its liability as lessee is prescribed by the statute to be "as if operating its own road" and this means simply that of an owner. But Division Two held in this case that this phrase did not so limit the lessee's liability but included its liability for the lessor's acts to the same extent as the lessor's statutory liability for the lessee's acts. That part of the state statute providing that the satisfaction of a claim or judgment by either shall discharge the other makes clear the mutual liability of the lessor and lessee.

Spaw v. *Kansas City Terminal Ry. Co.*, 198 Mo. App. 552, 201 S. W. 927, is this case exactly and illustrates the interpretation and effect given the state statute by the Missouri courts. There the common law suit of the employee of the lessor against both the lessor and the lessee for the negligence of the lessee was held to be improperly brought because the Missouri statute made the employee of the lessor the employee of the lessee so that the Federal Act exclusively governed his rights against both carriers. Of the effect of the Missouri statute, the court said (l. c. 559):

> The theory and purpose of such law is to prevent a railroad from evading the responsibility involved in the exercise of its corporate functions by delegating the operation of its road to another. Nor can a railroad avoid such responsibility by using the tracks of some other railroad. In other words, the effect of such law is to make the road that owns the track and the road that uses it *joint operators* of the highway thus existing, so far the duties and responsibilities involved in the exercise of railroad corporate functions are

concerned. It would seem to follow that if an employee of the lessor or licensor was injured while engaged in work which, at one and the same time, was not only a part of the general interstate commerce of the lessor or licensor but also of the particular interstate commerce being carried on by the lessee or licensee, then such injured person would * * * be engaged in the interstate commerce of both roads, and would be an "employee" of both roads within the meaning of the Interstate Commerce Act. [*North Carolina R. Co.* v. *Zachary, Admr.*, 232 U. S. 248] * * * Since the State statute makes the two railway companies, in the case at bar, *joint operators* of the road, *each responsible for the acts of the other in performing their corporate functions as a railroad*, at least within the limits hereinabove defined, and makes the equipment of the lessee the equipment of the lessor, and the road-bed of the lessor the road-bed of the lessee, *and the employees of each, the employees of the other*, with respect at least to the performance of the common functions of each railway company as a public carrier; and since the Federal statute makes any common carrier engaged in interstate commerce liable for injury to persons employed by it, in such commerce, due to * * * negligent operation of, either equipment or road, then it follows that the Federal Act makes each, the lessor and lessee, liable for injuries to the employees of the other, received while engaged at the time in interstate commerce, * * * caused by * * * negligent operation of either the lessor's road or the lessee's equipment. *Consequently, plaintiff is, by virtue of local law, to be regarded as the agent and employee of both roads*, and as both were engaged in interstate commerce and plaintiff was, at the time of his injury, engaged in the interstate commerce of both roads, *he will be regarded by the Federal law as an employee of both* and his right of action for the injury is governed and controlled exclusively by the latter law (Emphasis ours).

This opinion (never overruled or questioned by the Missouri Supreme Court) makes crystal clear the legal basis upon which the mutual liability of the lessor and lessee for the acts of the other rests. That basis is that, by the statute, the employees of one become the employees of the other. The legal basis is not imputed negligence at all, as Frisco would have this Court believe (pp. 9-14). *Miller v. Terminal R. R. Ass'n*, 349 Mo. 944, 163 S. W. 2d 1034, drives this point home. There the Federal Act suit of the employee of the lessor against the lessor for the negligence of the lessee was upheld. Terminal was the lessor; Mobile & Ohio the lessee. Of the effect of the Illinois statute (identical with Missouri's), Division One of the Missouri Supreme Court said (l. c. 954):

> It is quite clear, we think, that if there is a local law such as existed in the *Zachary case, supra,* and as exists in the present case, then an employee, injured or killed under such facts, as here, an action for such injury or death is properly under the Federal Employers' Liability Act. In the present case, the trial court instructed the jury "that *under the law of this case the agents and servants of the * * * Mobile & Ohio Railroad Company, * * *, are to be regarded by you as the agents and servants of the defendant." In view of the local law obtaining in Illinois, we think the instruction correctly stated the law.*
>
> * * * our ruling that the local law of Illinois made the employees of the M. & O., in law, the employees of defendant in so far as concerns responsibility for the death of Miller, * * * (Emphasis ours).

There is no substance in Frisco's argument that the Missouri statute does not make the employee of the lessor the employee of the lessee for the purpose of Federal Act suit.

Admittedly the purpose of the Missouri statute is to prevent the evasion of a railroad's charter obligations to the public by delegating the operation of the railroad to

another. But the Missouri courts have never, as Frisco intimates (p. 11), confined the statute to the lessor alone. A lessee cannot escape its charter obligations to the public either by running on the tracks of another, and the public to whom the obligation is owed includes employees of the lessor. Satisfaction of the statutory purpose requires the inclusion of both the lessor and the lessee within its imposition of mutual liability. *Miller* v. *Terminal R. R. Ass'n, supra; Spaw* v. *K. C. Terminal Ry. Co., supra; Francis* v. *Terminal R. R. Ass'n*, 354 Mo. 1232, 193 S. W. 2d 909.

Frisco claims (pp. 3, 9) that its license to operate over Terminal tracks was limited to Track 2. This is not true; it included all tracks owned by Terminal (Tr. 47).

CONCLUSION.

Respondents completely disregard the legal basis of our petition. Can the Federal Employer's Liability Act be construed to override a state statute to free a non-employing lessee under the Federal Act but not to override that same statute insofar as it makes a non-negligent lessor liable under the Federal Act for the sole negligence of its lessee? Nothing respondents have said justifies a denial of the writ.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1948.

KANSAS CITY TERMINAL RAILWAY COMPANY, a Corporation, *Petitioner*,

vs.

FRANK A. THOMPSON, Trustee of and for ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation, and ZONA GRAHAM, Administratrix of the Estate of Thomas Graham, Deceased, *Respondents*.

SEPARATE BRIEF OF RESPONDENT FRANK A. THOMPSON, Trustee of and for St. Louis-San Francisco Railway Company, a Corporation, in opposition to Petition for Writ of Certiorari.

No. 328.

STATEMENT.

Due to the fact that petitioner's statement, appearing in the petition for writ of certiorari, omits certain facts which appear to be material, counsel for respondent, Frank A. Thompson, Trustee St. Louis-San Francisco Railway Company (who will hereafter be referred to as

Frisco), respectfully call the Court's attention to the following:

On page 3 of petitioner's "Statement of the Matters Involved" it is recited that Section 5163, Mo. R. S. A. (the Missouri Lessor-Lessee Statute), provides that a railroad leasing or licensing the use of its tracks shall remain liable for the acts of the lessor or licensor and the lessor or licensor shall likewise be liable for the acts of licensee or lessor. This is an inaccurate statement of the provision of the statute. It provides:

> "Such lessee or licensee shall likewise be held liable and may sue and be sued in all cases and for the same causes, and in the same manner, as if operating its own road."

The contract, under which the Frisco train involved in the accident was being operated over track 2 of the Terminal was offered in evidence, and relied upon by the plaintiff. Such contract provided that the various railway companies who were parties thereto should have the right and privilege of running and operating passenger trains into the Union Passenger Station at Kansas City, Missouri, over and upon certain railroad tracks of the Terminal Company. It was agreed by the parties that the Frisco train involved in the accident was being operated over track 2 under such agreement at the time of the casualty (Tr. 52). The contract provided:

> "The Terminal Company shall have the exclusive management and control of the operation, maintenance, repair and renewal of the Terminal Facilities and every part thereof and shall establish rules and regulations governing the operation of trains within and upon the Terminal Facilities."

It was alleged in plaintiff's petition that at the time of his injury the deceased Graham was an employee of the defendant Kansas City Terminal Railway Company and at the time of his injury the Frisco train was being operated over a certain designated track by lease, license or permit granted by the Terminal (Tr. 3-5).

Plaintiff's petition further alleged that the death of the deceased occurred as a result of the negligence of the Terminal's licensee, the Frisco, and

> "That by reason thereof, and by operation of law the defendant Kansas City Terminal Railroad Company is liable to plaintiff for the death of said Thomas Graham, which was negligently caused by its lessees and licensees and their agents, servants and employees as hereinabove set forth" (Tr., p. 8).

The deceased was not in the employ of the Frisco and it had no right of any kind or character to direct and control him or to give any orders or directions to him or to any members of the crew with which he was working on the day of his injury (Tr., p. 78).

At the time of Graham's injury he and his crew were engaged as sole employees of the Terminal in switching freight cars on Terminal tracks 1, 112, 252 and 4730. There was no connection between track 1 and the other tracks above mentioned, which were used by Terminal switch trains exclusively, and track 2 over which it was agreed that the Frisco had a license to operate its passenger trains. Frisco had no license to use track 1 or the other tracks being used by Graham and the other Terminal employees at the time of his fatal injury.

The Supreme Court of Missouri in its opinion ruled and held that the Terminal had admitted on appeal in that court that it had been its theory throughout the case

and in both the trial and the appellate court that Graham was its employee, that both Graham and it were engaged in interstate commerce and that if Frisco was negligent the case was one to be submitted to the jury. The Missouri Supreme Court held that Terminal having committed itself to that theory was bound by it. (*Graham* v. *Thompson*, 212 S. W. (2d) 770, l. c., p. 778.)

POINTS OF FACT AND OF LAW AND GROUNDS URGED IN ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Under the uncontradicted evidence in the case, the deceased, at the time of his fatal injury and death, was not *employed* by the Frisco within the meaning of the Federal Employers' Liability Act and plaintiff was in no event entitled to recover judgment against the Frisco.

Sec. 51, Title 45, U. S. C. A.

Hull v. *Philadelphia Ry. Co.*, 252 U. S. 475, 40 S. Ct. 358.

Robinson v. *Baltimore & Ohio Railway Co.*, 237 U. S. 84, 35 S. Ct. 491, 59 L. Ed. 849.

Chicago, R. I. & Pac. R. R. Co. v. *Bond*, 240 U. S. 449, 36 Sup. Ct. 403.

II.

Section 5163, R. S. A. Mo. 1939, does not have the effect of making the employee of a lessor railroad the employee of the lessee railroad and it has never been so ruled and held by the Supreme Court of Missouri.

Sec. 5163, R. S. A. Mo., 1939.

Clark v. *Atchison, Topeka & S. F. Ry. Co.*, 6 S. W. (2d) 954, 319 Mo. 865.

III.

Terminal was bound by the theory adopted by it in the trial court and in the Supreme Court of Missouri and having conceded that the negligence of the Frisco was imputed to it under the Missouri Lessor-Lessee Statute was estopped from thereafter changing such theory in the appellate court.

Wiener v. *Mutual Life Ins. Co.*, 352 Mo. 673, 179 S. W. (2d) 39.

Knorp v. *Thompson*, 352 Mo. 44, 175 S. W. (2d) 889.

IV.

The opinion of the Supreme Court of Missouri is nowise in conflict with the opinion of this Court in *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 48, 58 L. Ed. 591, 34 S. Ct. 306.

V.

The rights and liabilities of the parties to this action are governed solely by the terms and provisions of the Federal Employers' Liability Act and all state laws upon the subject were superseded by the Federal Act.

Baltimore & O. R. Co. v. *Kepner*, 314 U. S. 44, 62 S. Ct. 6.

Bailey v. *Central Vermont Ry.*, 391 U. S. 350, 63 S. Ct. 1062.

ARGUMENT.

I.

Under the uncontradicted evidence in the case, the deceased, at the time of his fatal injury and death, was not *employed* by the Frisco within the meaning of the Federal Employers' Liability Act and plaintiff was in no event entitled to recover judgment against the Frisco.

The Federal Employers' Liability Act (Sec. 51, Title 45, U. S. C. A.), by its clear language is applicable only to *employees* of interstate carriers. This Court in *Hull* v. *Philadelphia Railway Co.*, 252 U. S. 475, 40 S. Ct. 358, ruled that the words "employee" and "employed" were used by Congress in the Act in their natural sense and described the conventional relationship of employer and employee and followed its previous ruling in *Robinson* v. *Baltimore & Ohio Railway Co.*, 237 U. S. 84, 35 S. Ct. 491, 59 L. Ed. 849, wherein it was declared:

> "For the 'liability created' by the act is a liability to the 'employees' of the carrier, and not to others; and the plaintiff was not entitled to the benefit of the provision unless he was 'employed' by the railway company within the meaning of the Act."

In *Chicago, R. I. & Pac. R. R. Co.* v. *Bond*, 240 U. S. 449, 36 S. Ct. 403, this Court held that the true test to determine whether or not a person performing service for an interstate railroad was an employee of such railroad was whether or not the right existed to control the manner and method in which the work should be done.

The evidence in the case at bar conclusively established that deceased was not in the employ of the Frisco. It had no right of any kind or character to direct and control

him, or to give any orders or directions to him or any members of his crew. The Frisco had no control or right of control over any of the operations, tracks or train movements of Terminal trains, and no license to use or right of control over the tracks being used by the deceased at the time of his death.

Plaintiff in her petition, under which the cause was tried, conceded that at the time of his death Graham was employed by the Terminal. It was not alleged in plaintiff's petition that Graham was an employee of the Frisco or that he became an employee of the Frisco under the Missouri Lessee-Lessor Statute. Plaintiff alleged that by reason of the fact that the Frisco train which struck Graham was being operated over a certain track belonging to the Terminal as a licensee, the Terminal, by operation of law, became liable to the plaintiff for the death of Graham "which was negligently caused by its lessee and licensee" (Tr., p. 8).

It will thus be seen that Graham was clearly not actually employed by the Frisco at the time of his fatal injury, and that it was not even claimed by the plaintiff in her petition that he became such an employee by operation of local Missouri law, but only that Terminal became liable by operation of law for the alleged negligence of the Frisco.

II.

Section 5163, R. S. A. Mo. 1939, does not have the effect of making the employee of a lessor railroad the employee of the lessee railroad and it has never been so ruled and held by the Supreme Court of Missouri.

Terminal's argument in support of its position that the Missouri Lessor-Lessee Statute had the effect of mak-

ing Graham an employee of both the Frisco and the Terminal is based upon a fallacious interpretation of the terms of that Act.

The Supreme Court of Missouri has never ruled or held that the Missouri Act, as a matter of law, makes the employee of the lessor road the employee of the lessee road. The effect of the Missouri decisions, prior to the decision in the case at bar, has been that under the Act the negligence of the lessee road is imputed to the lessor road. The statute specifically provides that the lessor or licensor "shall remain liable for all acts, debts, claims, demands, judgments and liabilities of the lessee or licensee." The statute then refers to the obligations and liabilities of the lessee and provides—

> "Such lessee or licensee shall likewise be held liable and may sue and be sued in all cases for the same causes, and in the same manner, *as if operating its own road.*" (Italics ours.)

In the case at bar, the Frisco had no license over track 1 or tracks 112, 252 and 4730 upon which the deceased was working at the time of his injury. Tracks 112, 252 and 4730 were switch or industrial tracks and all led to track 1. There was no connection between track 1, which was used for terminal switch trains exclusively, and track 2. Frisco was not the lessee or licensee of track 1 or the switch tracks above numbered. Under the express language of the Missouri Lessor-Lessee Statute it was provided that Frisco, in its use of track 2, should be held liable for the same causes and in the same manner *as if operating its own road.* Let us assume that Frisco was the owner of track 2, over which it was operating its passenger train by license, what would then have been its liability to Graham, the Terminal employee? Clearly there

could have been no liability under the Federal Act and recovery for the death, insofar as the Frisco was concerned, would be solely governed and controlled by the law of the State of Missouri providing for the recovery of damages for wrongful death. The Missouri Statute, upon its face, clearly shows that it was not the intent or purpose of the Missouri Legislature at the time of the passage of the Act to provide that employees of the lessor road should become, for all purposes, the employee of the lessee road. In the last sentence of the Act it is provided—

> "And for the purposes of jurisdiction and service of process, the servants, agents, employees, officers and offices of either of such corporations or person shall be held to be the agents, servants, employees, officers and offices of both, and service upon the agent, officers or employee of either corporation shall be held and deemed sufficient and valid service upon both of such corporations."

By the use of the foregoing language the Missouri Legislature clearly indicated that the servants, agents and employees of one road should be held to be the agents, servants and employees of either or both *only* for the purposes of jurisdiction and service of process. Surely, if the Legislature had intended to provide that the employees of the lessor road should become the employees of the lessee road, then it would clearly have so stated. The language of the Act negatives any such idea, and, as to the lessee road clearly provides that it shall be liable to all persons as if operating its own road.

It has been the long-established policy of the State of Missouri and of virtually all states in the Union to refuse to permit railroad companies to avoid their charter duties and franchise obligations by leasing their roads, or

by permitting other railroads to operate them. The theory of the Missouri Lessor-Lessee Statute is based upon the premise that the owner of a railroad in Missouri may not escape its charter or franchise obligation to the public by sale or lease of its line of railroad.

In the case of *Clark* v. *Atchison, T. & S. F. Ry. Co.*, 6 S. W. (2d) 954, 319 Mo. 865, the Supreme Court of Missouri recognized this public policy. In its opinion in that case the Supreme Court of Missouri declared (l. c., p. 959, 6 S. W. (2d)):

> "In view of the long-established policy of the state of not permitting railroad companies to avoid their charter duties and responsibilities by leasing their roads or permitting other companies to run trains over them, a legislative intent to relieve to any extent terminal companies from such duties or responsibilities must be made clearly manifest before the courts will be warranted in giving the alleged intent effect."

In the case at bar the franchise obligation was upon the Terminal, and not upon the Frisco. The purpose of the statute was to prevent the Terminal from evading or escaping its franchise obligation to the public by leasing its tracks or licensing the use thereof by other roads. There was thus a definite reason for the legislature to enact a law providing that a lessor road should be and remain liable for the acts of a lessee railroad. Because the lessee railroad had no franchise or charter obligations toward the public, it was only just and reasonable that the Missouri Legislature should provide that it be liable and be subject to suit for the same causes and in the same manner as if operating its own road.

If the Frisco had owned track 2, which closely paralleled track 1 belonging to the Terminal, its liability for

death of one not employed by it would have been under the Missouri Wrongful Death Statute and not under the Federal Act. Its liability for the death of Graham in such case would have been no greater than its liability for the death of any other third person not employed by it, and injured on its tracks through the negligence of its employees. The fact that Graham at the time of his death was employed by another independent railroad company engaged in interstate commerce would in nowise have altered the situation.

Furthermore, the Supreme Court of Missouri, *en banc*, in its opinion in the case at bar, ruled and held that under all of the facts Graham was not an employee of the Frisco under the terms and provisions of the Missouri Lessor-Lessee Statute. The Missouri Supreme Court having interpreted such statute, this Court, under the rule laid down in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, should follow and apply such interpretation.

III.

Terminal was bound by the theory adopted by it in the trial court and in the Supreme Court of Missouri and having conceded that the negligence of the Frisco was imputed to it under the Missouri Lessor-Lessee Statute was estopped from thereafter changing such theory in the appellate court.

The Terminal cannot be heard to complain that the Supreme Court of Missouri erroneously ruled that it was liable for the death of Graham if Frisco was negligent. Graham was its employee and not the employee of the Frisco. Both Terminal and Graham were engaged in interstate commerce for the Terminal and not the Frisco. The Missouri Act specifically provides that the Terminal "shall remain liable for all acts * * * of the lessee or li-

censee." Frisco was its licensee. The Terminal in the trial court and upon appeal in the Supreme Court of Missouri admitted and it was its theory throughout the case that Graham was its employee; that both Graham and it were engaged in interstate commerce and that if Frisco was negligent the case was one to be submitted to the jury. The Terminal having committed itself to that theory was bound by such theory in the Supreme Court under the law of Missouri. See *Wiener* v. *Mutual Life Insurance Co.*, 352 Mo. 673, 179 S. W. (2d) 39; *Knorp* v. *Thompson*, 352 Mo. 44, 175 S. W. (2d) 889.

IV.

The opinion of the Supreme Court of Missouri is nowise in conflict with the opinion of this Court in *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 48, 58 L. Ed. 591, 34 S. Ct. 306.

That case definitely did not rule than an employee of a lessor railroad automatically became an employee of the lessee railroad, for the purpose of the Federal Act, if, and when injured by the lessee's sole and separate operation. If it be thought that the Zachary case ruled that negligence of a lessee railroad should be imputed to a lessor railroad by force and effect of local law, such ruling does not control the question here presented and is in the converse.

Under the language of the Missouri Lessor-Lessee Statute, and under the theory adopted by the Terminal in the trial and appellate courts, the ruling and holding of the Supreme Court of Missouri that Terminal was liable under the Federal Act, and the Frisco was not liable under such Act, is in nowise inconsistent with or in conflict with any of the controlling decisions of this Court. The Missouri Lessor-Lessee Act does not provide that the em-

ployees of the lessee become the employees of the lessor but provides that the lessor shall be liable for the acts of the lessee. In other words, the Terminal in the case at bar was liable to its employees for the negligent acts of its licensee, the Frisco. The negligence of the Frisco employees became the negligence of the Terminal, not because Frisco employees became Terminal employees, but because the negligence of Frisco employees was imputed to and became the negligence of the terminal.

V.

The rights and liabilities of the parties to this action are governed solely by the terms and provisions of the Federal Employers' Liability Act and all state laws upon the subject were superseded by the Federal Act.

The Supreme Court of Missouri, in its opinion in this case, made an exhaustive review of the federal authorities on above point and correctly ruled and held that the Federal Act may neither be abridged nor enlarged by state statute. Under the Federal Act, which is applicable only to employees of railroads sought to be charged with liability, the terms "employee" and "employed" have heretofore been defined by this Court and the federal courts of appeal.

The Supreme Court of Missouri, under the federal authorities referred to and discussed in the opinion, correctly ruled and held that the deceased could not under the Federal Act become an employee of the Frisco by reason of any terms and provisions of the Missouri Lessor-Lessee Statute.

This Court in *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44, 62 S. Ct. Rep. 6 (l. c., pp. 9-10), declared, in discussing the Employers' Liability Act, said:

> "It is clear that the allowance or denial of this federal privilege is a matter of federal law, not a matter of state law under *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 72, 58 S. Ct. 817, 819, 82 L. Ed. 1188, 114 A. L. R. 1487. Its correct decision depends upon a construction of a federal act. Consequently the action of a state court must be in accord with the federal statute, and the federal rule as to its application rather than state statute, rule or policy."

In *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062 (l. c., p. 1063), this Court declared:

> "Sec. 1 of the Act makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents or employees.' The rights which the Act creates are federal rights protected by federal rather than local rules of law."

Absent an actual relationship of employer or employee under the tests laid down by federal law, Graham did not and could not become an employee of the Frisco by reason of the Missouri Lessor-Lessee Statute which was adopted by the Missouri Legislature on March 19, 1907 (Laws of Missouri, 1907), and prior to the adoption of the Federal Act of April 22, 1908.

Conclusion.

WHEREFORE, it is respectfully submitted that petitioner's petition for writ of certiorari should be denied.

M. G. ROBERTS,
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THOS. E. DEACY,
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J. L. MILLIGAN,
CLIFFORD B. KIMBERLY,
Of Counsel.

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Argument—

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 328.

KANSAS CITY TERMINAL RAILWAY COMPANY, PETITIONER,

VS.

FRANK A. THOMPSON, TRUSTEE OF AND FOR ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, AND ZONA GRAHAM, ADMINISTRATRIX OF THE ESTATE OF THOMAS GRAHAM, DECEASED, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

RESPONDENT ZONA GRAHAM, ADMINISTRATRIX', BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF CASE.

Terminal was lessor and Frisco lessee of certain tracks in Terminal yards in Kansas City, Missouri. Graham, a

switchman for Terminal then engaged in its interstate commerce, was struck and killed by Frisco train using such leased facilities. His widow brought suit against both Terminal and Frisco under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*) and recovered judgment against both. Upon appeal the Supreme Court of Missouri affirmed judgment as against Terminal but reversed as to Frisco (R. 432/445). Terminal now seeks a writ of certiorari to review that judgment.

The position of this respondent in opposing the petition for writ of certiorari should be made clear. Throughout the course of this case, as shown by her petition, she claimed that the Terminal, as lessor of the tracks upon which the Frisco train was being operated at the time of Graham's death, was liable for any negligence of the Frisco, its lessee (Tr. 48, 262/3). She also claimed that the Frisco (although not the general employer of Graham) was liable under the Federal Act because at the time of his death Graham was engaged in interstate commerce "for both defendants" (Tr. 5).

In this position she was substantially joined by the Terminal although that defendant strongly asserted throughout that she had not made a submissible case of negligence against the lessee, the Frisco, and therefore it, the lessor, could not be held liable (Tr. 26/7-221/2-259/60-340/1). The Frisco on the other hand always claimed that no liability existed as to it since no negligence was shown, Graham was not its servant, and was not engaged in its interstate business at the time of his death (Tr. 219/20-256/7-333).

In the opinion of the Supreme Court of Missouri now sought to be reviewed (Tr. 432/445) that court *en banc* unanimously held that the Terminal was liable for its lessee's negligence (held to have been shown), but held that

the Frisco was not liable for the reason that no conventional relationship of master and servant existed between it and the deceased and he was not engaged in interstate business on its behalf at the time of his death (Tr. 434/438).

This respondent does not disagree with the result reached by the Supreme Court of Missouri in affirming the judgment against the Terminal. Terminal seeks to attack the opinion upon the ground that if the Missouri Lessor-Lessee Statute (Sec. 5163, R. S. Mo., 1939) is inapplicable to create the necessary conventional relationship of master and servant by operation of law as between the deceased and Frisco, it necessarily must also be inapplicable to charge the Terminal with the negligence of its lessee, the Frisco.

With this position of Terminal here the respondent Graham strongly disagrees. No such strained result follows from the court's opinion below. If any such issue were now in this case it would be unavailable to Terminal here upon certiorari.

That, briefly, is the position of respondent Graham in this proceeding. Additional facts necessary to support this position will be hereinafter referred to where appropriate.

SUMMARY OF ARGUMENT.

The writ of certiorari herein should be denied for the following reasons:

First, because no federal question now claimed to be the basis for this court's jurisdiction was presented in the Missouri Supreme Court by petitioner until its Motion for Rehearing, which Motion was overruled without opinion;

Second, the Missouri Supreme Court did not pass upon any federal question in its decision as to Terminal's liability but ruled that point upon previous admissions and the trial and appeal theory of Terminal to which it was held bound and committed;

Third, the decision of the Missouri Supreme Court as to the Terminal's liability is not in conflict with any decision of this court or any previous decisions of the Missouri Supreme Court or courts of last resort of other jurisdictions;

Fourth, the correct judgment as to the Terminal's liability herein was rendered by the Supreme Court of Missouri and would be affirmed by this court upon certiorari;

Fifth, the decision of the Missouri Supreme Court as to the non-liability of Frisco furnishes no ground for Terminal's request for writ of certiorari.

ARGUMENT.

I.

The Writ of Certiorari Should Be Denied for the Reasons That the Petitioner, Terminal, Did Not Properly Assert a Federal Question for Determination Below, the Decision of the Supreme Court of Missouri Was Not Based upon a Federal Question and Its Decision Is Not in Conflict with Controlling Decisions of This Court.

Petitioner seeks to invoke the jurisdiction of this court under the terms of 28 U. S. C., Sec. 344 (a) and (b) (Pet. p. 7). In the Conclusion of its brief it claims that it has been deprived of its rights under the Federal Employers' Liability Act (Pet. p. 38). The argument to support this view seems to be that the Missouri Supreme Court erroneously held the Terminal liable under the act although it was itself not negligent.

The applicable provision of the jurisdictional statute is as follows (28 U. S. C., Sec. 344 (b)):

> "It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State * * * where any title, right, privilege or immunity is specially set up or claimed by either party under * * * any * * * statute of * * * the United States; * * *."

The Rules of this court contain the following added provision (Rule 38 (5) U. S. Supreme Court, 28 U. S. C. A. Pocket Part, p. 163):

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be

granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

This case does not come within the purview of either the statute or rule.

A.

Any Federal Question Which May Have Been in This Case Was First Presented by the Petitioner on Motion for Rehearing Before the Missouri State Supreme Court and Was Therefore Too Late.

The record in this case clearly shows that the alleged federal question which petitioner claims as the basis for the exercise of this court's jurisdiction is that it has been deprived of its rights under the Federal Employers' Liability Act in that the Missouri Supreme Court has held it liable under that act where no negligence was alleged or proved against it. Petitioner asserts that the plaintiff below was thus relieved of the requirement of the Federal Act requiring proof of negligence and it was deprived of its right to require such proof. Whether or not this is a valid federal question sufficient to invoke the jurisdiction of this court is not necessary for determination here. This for the reason that the petitioner did not raise this point until its Motion for Rehearing after final decision of the Missouri Supreme Court herein (Tr. 455-471 incl.). Prior to that time in the long history of this litigation, the Terminal took the position that it was liable for the negligence of its lessee, the Frisco, under the Federal Em-

ployers' Liability Act; that the lessee Frisco was also liable under such act, but that no negligence had been proved and no submissible case of negligence made. In its brief filed in the Supreme Court before final decision this position was taken by petitioner (Tr. 406-413). After submission of this case originally in Division Two of the Supreme Court of Missouri, which Division affirmed the judgment as against both Terminal and Frisco (Tr. 355-363 incl.), the Terminal's Motion for Rehearing and Suggestions in Support thereof (Tr. 360-378 incl.) were direct attacks upon that decision upon the basis that no negligence had been proved and no submissible case made. Not one word was said therein by the Terminal about its present theory.

After the first decision of the Missouri Supreme Court *en banc* plaintiff filed a Motion for Rehearing (Tr. 402-430 incl.). No suggestions were filed in opposition to this Motion for Rehearing by either Terminal or Frisco. The rehearing was granted and the case reargued and resubmitted and the present opinion, now sought to be reviewed, was rendered (Tr. 432-435 incl.).

The present theory of the Terminal was raised thereafter for the first time in its Motion for Rehearing, but even in that the Terminal took the position as follows (Tr. 457-458):

> "We have always maintained that by virtue of the statute the deceased was a joint employee of both appellants and if Frisco was negligent both appellants were *jointly liable* under the Federal Act" (Italics ours).

This Motion for Rehearing was overruled by the Supreme Court *en banc* without opinion (Tr. 426).

It thus appears that the petitioner's present position and theory, that it is being deprived of its federal rights

because it is being held responsible for the negligence of another, was raised for the first time after final decision of the Missouri Supreme Court. *It could have been raised at any time in the proceeding because no negligence was ever charged or attempted to be proved against the Terminal.* The raising of this question by the Terminal for the first time upon Motion for Rehearing was too late to present any federal question to this court upon certiorari. This rule has been stated many times by this court. Reference is made to the case of *Herndon* v. *State of Georgia*, 295 U. S. 441, 79 L. Ed. 1530, wherein this court said:

> "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late unless the court actually entertains the question and decides it. *Texas & P. R. Co.* v. *Southern Pacific Co.*, 137 U. S. 48, 54, 34 L. Ed. 614, 617, 11 S. Ct. 10; *Loeber* v. *Schroeder*, 149 U. S. 580, 585, 37 L. Ed. 856, 858, 13 S. Ct. 934; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 181, 64 L. Ed. 213, 214, 40 S. Ct. 116; *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117, 67 L. Ed. 556, 563, 43 S. Ct. 288; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 454, 455, 68 L. Ed. 382, 387, 388, 44 S. Ct. 197, and cases cited."

In the case of *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 77 L. Ed. 231, this court said:

> "The surety company petitioned for a rehearing. In that petition besides reiterating several of its previous contentions it urged for the first time that the rendition of the judgment on its understanding violated the due process clause of the 14th Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same grounds of objection had been raised throughout the

proceeding but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the 14th Amendment. Cases cited."

See also, *Radio Station WOW, Inc.*, v. *Johnson*, 326 U. S. 120, 89 L. Ed. 292.

Further citation of authority upon this well-settled principle is unnecessary.

Applying this rule to the case at bar the writ should be denied since although there was ample opportunity throughout the entire course of this litigation for petitioner to raise its so-called federal question it failed to do so until after final decision of the Missouri Supreme Court in its Motion for Rehearing which was denied without opinion and came too late to present this matter upon certiorari.

B.

The Writ of Certiorari Should Be Denied Herein Because the Missouri Supreme Court in Its Decision As to the Petitioner, Terminal, Did Not Pass upon Any Federal Question.

Before this court should take jurisdiction upon application for writ of certiorari, it should clearly appear that the decision of the Missouri Supreme Court, sought to be reviewed, passed upon a federal question which deprived petitioner of federal rights. It has been pointed out under division I A of this Argument that no such federal question was in the case at the time of the decision of the Missouri Supreme Court as to this petitioner. The basis of the state court's affirmance as expressed by that court is as follows (Tr. 442):

"In the Circuit Court and here upon appeal *Terminal admitted, and it has been the theory of Terminal throughout the case*, that Graham was its em-

> ployee, that both Graham and it were engaged in interstate commerce and *that if Frisco was negligent the case was one to be submitted to the jury. Terminal committed itself to that theory and is bound by it. Weiner* v. *Mutual Life Ins. Co.*, 352 Mo. 673, 676, 179 S. W. 239. *Knorp* v. *Thompson*, 352 Mo. 44, 175 S. W. 2d 889" (Italics ours).

Terminal now claims that there was no basis for the above finding of the court with reference to its trial position and admissions. The record clearly indicates otherwise. In counsel's opening statement to the jury in the trial below, this was said (Tr. 26):

> "There is no charge and no evidence that there was any negligence so far as the Kansas City Terminal Railway is concerned in this matter. We are a defendant in this lawsuit by reason of the fact that we are the owners of the track on which this Frisco train was operating at the time that Mr. Graham met his unfortunate death."

In the early part of the trial counsel for plaintiff offered the operating agreement between the Terminal and the Frisco (Tr. 40-52 incl.) and certain parts of it were read to the jury without objection from counsel for the Terminal.

At the conclusion of the trial when instructions were offered by all parties the Terminal did not offer any instruction based upon the theory that it was not liable for the negligence of the Frisco or that the jury was required to find against both defendants (Tr. 260-301, incl.). If that trial theory had been adopted by the Terminal then the overruling of such proffered instruction would have been the basis for error upon appeal.

In the appellate court the Terminal stated its position and theory as follows (Tr. 406):

"POINTS RELIED UPON.

I.

"Deceased Graham was, under the undisputed facts, an employee of the Frisco within the meaning of the Federal Employers' Liability Act by virtue of the Missouri Lessor Statute, *so that the case was properly submitted against both defendants under the Federal Act*" (Italics ours).

In its Argument in this brief, Terminal stated (Tr. 407):

"Plaintiff's amended petition pleaded (Tr. 2) and plaintiff's main Instruction No. I (Tr. 260) submitted her case against both defendants under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, *et seq.*). *We contend and plaintiff contends that the submission was proper* because under the undisputed facts Graham was, at the time of his death, a joint employee of both defendants within the meaning of the Federal Act by virtue of the Missouri Lessor Statute (Sec. 5163, R. S. Mo., 1939)" (Italics ours).

(Tr. 409:)

"Upon the foregoing facts we believe that *the case was properly submitted to the jury under the Federal Act against both defendants because* Graham was a joint employee of both defendants by virtue of the Missouri Lessor Statute and was employed in the interstate commerce of both within the Federal Act."

(Tr. 410:)

"The Frisco and Terminal were both engaged in interstate commerce and Graham was so engaged for both defendants."

(Tr. 412:)

"This court and the Supreme Court of the United States have consistently sustained suits under the Federal Act by employees of *either* the lessor or lessee *against either* for injuries or death caused by the lessee's negligence. The employee of the lessee may sue the lessor for the lessee's negligence (*North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 34 S. Ct. 305), *or the employee of the lessor may sue the lessor for the lessee's negligence* (*Miller* v. *Terminal R. Assn., supra. Francis* v. *Terminal R. R. Assn.*, 193 S. W. 2d 909 (Div. 2)) * * *" (Italics ours).

In a Supplemental Brief filed by Terminal this position was taken (Tr. 413):

"SUMMARY OF TERMINAL'S POSITION.

"1. * * * The lessee's liability is by those statutes defined to be 'as in the same manner if operating its own road.' Division Two properly held that this did not mean that its liability was limited to that of an owner, but that its liability was the same as that of the lessor, when effect is given to the further provisions of the statutes *permitting suit against either the lessor or lessee or both jointly* and providing that satisfaction in full by either road shall discharge the other."

(Tr. 414:)

"We briefly analyze the cases sustaining similar suits under the Federal Act:

* * * * * * *

"*Miller* v. *Terminal R. R. Assn.*, 349 Mo. 944, 163 S. W. 2d 1034 (Div. 1). Employee of the lessor against the lessor for the negligence of the lessee.

"*Francis* v. *Terminal R. R. Assn.*, 193 S. W. 2d 909 (Div. 2). Employee of the lessor against the lessor for the negligence of the lessee.

* * * * * * *

"2. We cannot refrain from three observations respecting the Motion of the Terminal Railroad Association of St. Louis for permission to file a brief and to make an oral argument. *First, nothing is now presented to this court for decision except the liability of Frisco, the lessee, under the Federal Act upon the facts in this case.* This court is not called upon to decide and presumably will not now decide the liability of the lessor or the lessee under the Federal Act in other and different circumstances. *Second,* the question of whether Graham was or was not an employee of the Frisco is properly a matter of state law to which the United States Supreme Court will give effect in determining the coverage of the Federal Employers' Liability Act. *North Carolina R. R. Co.* v. *Zachary, supra; Chi., B. & Q. R. Co.* v. *Willard,* 220 U. S. 413, 31 S. Ct. 460. *Therefore, federal determination of the effect of Sections* 5162 *and* 5163 *is wholly unnecessary.* * * *" (Italics ours).

The above quotations clearly show the trial and appeal theory of the Terminal in this case. Certainly these admissions were sufficient basis for the Missouri Supreme Court to rule that Terminal was committed to that theory and was bound by it and that it was unnecessary for that court to pursue the matter further. That was obviously the sole basis for the decision of the Missouri Supreme Court and does not constitute a decision involving a federal question sufficient to invoke the jurisdiction of this court upon certiorari. The basis of the court's decision was found in the state law, not upon federal question.

This court has expressed itself very forcibly against accepting jurisdiction to review state decisions which do not affect federal rights. In the case of *Herb* v. *Pitcairn,* 324 U. S. 117, 89 L. Ed. 789, this court said:

"This court from the time of its foundation has adhered to the principle that it will not review judg-

ments of state courts that rest on adequate and independent state grounds (Cases cited). The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

* * * * * * *

"* * * In many cases the answer has been a strict adherence to the rule that it must affirmatively appear that the federal question was decided and *that its decision was essential to disposition of the case;* and that where it is not clear whether the judgment rests on a federal ground or an adequate state one, this court will not review (Cases cited)" (Italics ours).

In *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 80 L. Ed. 158, the court said:

"* * * The case is controlled by the settled rule that where the judgment of some State court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule has been firmly fixed at least as early as *Klinger* v. *Missouri*, 13 Wall. 257, 263, 20 L. Ed. 635, 637, and has been reiterated in a long line of cases since that time."

Neither can this court properly accept jurisdiction where it is necessary to surmise that a federal question is involved or strain the construction of a state decision toward the conclusion that such a question is involved or where a state court has declined to consider a federal question. See *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 79 L. Ed. 191; *Penn. Ry. Co.* v. *Illinois Brick Co.*, 297 U. S. 447, 80 L. Ed. 796.

The fact that the Supreme Court of Missouri may have decided and ruled upon the liability of the Frisco in such a way and under such conditions as to bring into the case a Federal question as to it (with which result Terminal disagrees) is not available as a ground to be urged in this proceeding by the *Terminal*. The respondents do not here complain of that result. Respondent, Graham, is the only proper party to raise the alleged error in the result reached as to Frisco. Petitioner can complain of only such parts of the decision as were adverse to it not those parts favoring its co-defendant (whose liability is asserted by Terminal to be joint).

See: *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 78 L. Ed. 452; *Marine Transit Corp.* v. *Dryfus*, 284 U. S. 263, 76 L. Ed. 282.

We therefore urge that the writ of certiorari be denied because the decision of the Missouri Supreme Court affirming the judgment as to the petitioner, Terminal, did not rest upon any federal ground or question but strictly upon admissions and the trial and appellate theory of Terminal to which it became and was committed under the law of the state of Missouri.

C.

The Decision of the Missouri Supreme Court Is Not in Apparent Conflict with Any Applicable Decisions of This Court or Other Federal Decisions.

Petitioner asserts that a conflict exists between the decision of the Missouri Supreme Court and certain decisions of this court and other jurisdictions (Pet. Brief, p. 38). The declaration of this court's policy with reference to the exercise of its discretion in granting the writ upon this ground states [Rule 38 (5) (a)]:

> "Where a state court has decided a *federal question of substance* * * * in a way probably not in accord with applicable *decisions of this court.*"

We believe that we have demonstrated above that no federal question warranting the assertion of this court's jurisdiction was either properly presented by petitioner below nor decided by the Supreme Court of Missouri in its decision with reference to Terminal's liability.

However, if the alleged federal question urged by petitioner had been properly presented below the decision of the Missouri Supreme Court was not in any conflict with applicable decisions of this court. The cases relied upon by petitioner show no such conflict.

In *Dickinson* v. *Stiles,* 246 U. S. 61, 62 L. Ed. 908; *Gilvary* v. *Cuyahoga V. Ry. Co.,* 292 U. S. 57, 78 L. Ed. 1123, and *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 89 L. Ed. 1915, this court was considering cases not brought or prosecuted under the Federal Employers' Liability Act. They had in common with the cases of *C., M. & St. Paul R. Co.* v. *Coogan,* 271 U. S. 472, 70 L. Ed. 521; *Frese* v. *Chi., B. & Q. R. Co.,* 263 U. S. 1, 68 L. Ed. 151; *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 29, 61 L. Ed. 1045, and *Tenant* v. *Peoria & U. R. Co.,* 321 U. S. 29, 88 L. Ed. 520 (all cases involving the Federal Employers' Liability Act), the additional distinguishing features that no lessor-lessee relationship or state law with reference to continuing liability of a railroad lessor for the negligence of its lessee were involved. Also none of the cases were ruled upon the principle that the complaining party was bound by its trial and appeal theory. These decisions are therefore inapplicable upon the facts and no conflict could or does exist between the rulings of this court therein and the decision of the Missouri Supreme Court here sought to be reviewed.

In the case of *C., B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 55 L. Ed. 521, which was a suit under the common law this court held that under the Illinois Lessor-Lessee statute both the lessor and the lessee were jointly and severally liable for the death of lessee's servant killed by the negligence of the lessee.

Following the principles of that decision but in an action under the Federal Employers' Liability Act this court in *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591, held a lessor liable for the death of employee of the lessee caused by the negligence of lessee under North Carolina local law. The defendant (lessor) in that case was not guilty of any active negligence but was held liable for the negligence of its lessee.

In the case of *Southern Ry. Co.* v. *Lloyd*, 239 U. S. 496, 60 L. Ed. 402, following, but somewhat extending the doctrine of the *Zachary case, supra*, this court held that both the lessor and the lessee railroads were liable for injury to an employee of the lessee through the negligence of the lessee under North Carolina local law.

The cases of *Hull* v. *Philadelphia & R. Ry. Co.*, 252 U. S. 475, 64 L. Ed. 670, and *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, 59 L. Ed. 849, were both suits under the Federal Employers' Liability Act but are clearly distinguishable from the opinions pronounced by this court in the *Willard, Zachary* and *Lloyd cases, supra.*

In the Hull case this court held that the licensor was not liable for the death of an employee of the licensee, killed by the negligence of the licensor, since there was no dominant rule of local law of continuing liability on the part of the licensor.

In the Robinson case an employee of the Pullman Company injured by the negligence of the defendant

sought to recover against the defendant upon a private contract between it and the Pullman Company. This court held that he was not an employee of the Baltimore and Ohio, there was no lease involved and no local law of continuing liability.

The decision of the Supreme Court of Missouri is, therefore, not in any apparent conflict with the decisions of this court relied upon by petitioner. In fact the Willard, Zachary and Lloyd cases support the theory of the Missouri Supreme Court that where local law prevents the lessors of railroads from escaping responsibility for the negligence of their lessees, suit can be brought against such lessors who are not negligent.

We therefore urge upon this point that the writ of certiorari be denied because the decision of the Supreme Court of Missouri is in accord with, and not in conflict with, applicable decisions of this court.

D.

The Decision of the Missouri Supreme Court Is Not in Conflict with Previous Decisions of That Court or Other State Courts of Last Resort.

Although it is probably not a sufficient ground for the exercise of this court's discretion in granting a writ of certiorari, petitioner claims that the decision of the Missouri Supreme Court holding it as lessor liable for its lessee's negligence under its trial and appellate theory is in conflict with other decisions of that court and of courts of last resort of other state jurisdictions. Such is not the case. For example:

In the cases of *Francis* v. *Terminal R. R. Assn.*, 354 Mo. 1232, 193 S. W. 2d 909, and *Miller* v. *Terminal R. Assn.*, 349 Mo. 944, 163 S. W. 2d 1034, which were both

suits under the Federal Employers' Liability Act, the former involving the Missouri Lessor-Lessee statute, and the latter involving the Illinois statute, the court held the lessor liable to its employee injured by the lessee's negligence.

In the case of *Smith* v. *Thompson,* 182 S. W. 2d 63, The Supreme Court of Missouri held both the lessor and the lessee liable for the death of an employee of the lessee by reason of the joint negligence of the lessor and the lessee.

In the cases of *Clark* v. *A., T. & Santa Fe R. Co.,* 319 Mo. 865, 6 S. W. 2d 954, and *Fleming* v. *La. & M. R. Co.,* 263 Mo. 180, 172 S. W. 355, the Missouri Supreme Court, in common law actions involving the rights of third persons, held both the lessee and the lessor liable for the lessee's negligence.

In the case of *Spaw* v. *K. C. Terminal Ry. Co.,* 198 Mo. App. 552, 201 S. W. 927, the Kansas City Court of Appeals, in a suit brought under the Federal Employers' Liability Act, held both the lessor and the lessee liable for the lessee's negligence.

It is therefore apparent that the decision in the case at bar holding the lessor liable for the negligence of the lessee under the Missouri statute and under its trial and appeal admissions and theory is in no wise in conflict with any previous decisions of that court.

In the case of *Armstrong* v. *Chi. & I. R. Co.,* 350 Ill. 426, 183 N. E. 478, the lessor and lessee were both held liable for the lessee's negligence resulting in injury to an employee of the lessee, and in *Wilson* v. *Terminal R. Assn.,* 333 Ill. App. 256, 77 N. E. 2d 429, the lessor was held liable to an employee of the lessee for the negligence of the lessor. Both of these cases involved the Illinois Les-

sor-Lessee statute almost identical in terms with the Missouri statute.

In the case of *Barnes* v. *Red River & G. R. R. Co.*, 14 La. App. 188, 128 So. 724, an employee of the lessor was allowed to recover against the lessor for lessee's negligence. A Federal Employers' Liability case.

In the case of *Lloyd* v. *North Carolina R. R. Co.*, 162 N. C. 485, 78 S. E. 489; 166 N. C. 24, 81 S. E. 1003, 239 U. S. 496, 60 L. Ed. 402, in a suit under the Federal Employers' Liability Act, an employee of the lessor injured by the negligence of the lessee was allowed to recover against both the lessor and the lessee, and in *Logan* v. *North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959, an employee of the lessee injured by reason of the negligence of the lessee was allowed to recover against the lessor. In both of these cases the local law of North Carolina fixing the liability of the lessor railroad for the negligence of its lessee was involved.

The decision of the Missouri Supreme Court holding the lessor responsible for the negligence of its lessee, the Frisco, under the Missouri statute and the admissions and theory of petitioner in the trial and appeal of the case is, therefore, not in conflict with any decisions of courts of last resort in other jurisdictions.

II.

The Decision of the Missouri Supreme Court Holding the Terminal Liable for the Negligence of Frisco Is the Only Result Which Could Ever Be Reached in This Case As to Its Liability and This Court Should Not Grant Certiorari to Review Such Finding.

Even absent the trial and appellate theory and admissions of petitioner that it was responsible for the negli-

gence of its lessee, Frisco, such responsibility is fixed by all the statutory and common law rules applicable to this case both state and federal, and no other result could ever be reached as to the Terminal's responsibility in this case.

It is not the policy of this court to accept jurisdiction upon certiorari of cases to revise, rewrite or modify state court opinions where the end result would be the same.

In *Herb* v. *Pitcairn*, 324 U. S. 117, 89 L. Ed. 789, the rule was stated thus:

> "* * * Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State court after we corrected its views of the Federal laws, our review could amount to nothing more than an advisory opinion * * *."

All elements to support an affirmance of the judgment against the Terminal under the Federal Employers' Liability Act are present in this case, namely:

(1). The conventional relationship of master and servant existed between Terminal and deceased.

(2). Deceased was engaged in interstate commerce on behalf of Terminal at the time of his death, and

(3). Deceased was injured and killed as a direct result of the negligence of Terminal's lessee or agent.

Upon reconsideration or rehearing the judgment against it would be affirmed.

A.

Terminal Is Liable for the Negligence of Its Lessee Both under the State and Federal Law.

We believe that the cases cited and discussed under Point I of this brief conclusively demonstrate that in those states which have common law rules or statutes declarative of the common law principle that railroads cannot escape their charter responsibilities by lease or license of their facilities but are and remain liable for the negligence of their lessee or licensee, that the liabilities thus fixed upon such roads may be enforced in an action under the Federal Employers' Liability Act.

Indeed Terminal concedes that rule in its brief filed herein by saying (Petitioner's Brief, p. 37):

> "Petitioner has always claimed—and now claims —that Graham was a joint employee of both carriers, and has always conceded—and now concedes—that if so, *and if Frisco was negligent Terminal is also liable to plaintiff, although it was not itself negligent, because of the state statute* * * *" (Italics ours).

Clearly the Terminal is liable for the negligence of its agents. The Federal Employers' Liability Act reads in part as follows (45 U. S. C. A., Sec. 51):

> "Every common carrier by railroad * * * shall be liable in damages * * * for such injury or death *resulting* in whole or in part *from the negligence of any of the * * * agents * * * of such carrier * * *"* (Italics ours).

The Frisco was an "agent" of the Terminal by reason of the state law. We need not speculate about this for this court in *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591, confronted with this precise situation with reference to the relationship of the railroads said (l. c. U. S. 258):

"* * * Such a lease—certainly so far as concerns the rights of third parties, including employees as well as patrons—*constitutes the lessee as the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or intrastate commerce, the lessor is responsible*" (Italics ours).

A clearer definition of the relationship arising from the lease of railroad facilities cannot be found. Principals and agents need not be sued jointly for the negligence of the agent and recovery may be had against a principal, not negligent, based upon the negligence of his agent. The same general rule applies under the Federal Employers' Liability Act cases as to lessor and lessee. No other sound decision could be reached in this case other than that the Terminal was liable for the Frisco's negligence. The writ of certiorari should therefore be denied.

B.

The Problem of Whether or Not the Terminal As Lessor Was Liable for the Negligence of Frisco Its Lessee Was Properly One for Determination of the Supreme Court of Missouri under State Laws and Having So Decided This Court Would Give Effect to Its Decision.

The points in this case (1) as to whether or not Terminal was liable for Frisco's negligence and (2) whether Graham was an employee of Frisco were proper questions for determination of the Supreme Court of Missouri under applicable state law. That court has determined those points in a manner (as previously demonstrated) not in conflict with its prior decisions nor any decisions of this court. It held (1) That Terminal was liable for Frisco's negligence under the provisions of the Missouri lessor-lessee statute and (2) that Graham was not an employee of Frisco since he was not engaged in its business at the time of his death.

Upon reconsideration, having regard for the rule of *stare decisis*, that court would reach the same results. They are not questions for this court upon certiorari. Petitioner has so admitted when it said in its Supplemental Brief (Tr. 414):

> "* * * The question whether Graham was or was not an employee of the Frisco is properly a matter of State law to which the United States Supreme Court will give effect in determining the coverage of the Federal Employers' Liability Act. *North Carolina R. R. Co.* v. *Zachary, supra; Chi., B. & Q. R. Co.* v. *Willard*, 220 U. S. 413, 31 S. Ct. 460. *Therefore, federal determination of the effect of Sections* 5162 *and* 5163 *is wholly unnecessary*" (Italics ours).

This court held in the *Zachary case, supra*, that whether or not the lessor was responsible for the negligence of the lessee resulting in injury to the servant of the lessee was a matter for state determination. *Neither negligence nor conventional employment were shown in that case* (*North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 34 S. Ct. 305).

This court in *Chi., B. & Q. R. Co.* v. *Willard*, 220 U. S. 413, 55 L. Ed. 527, also adhered to that rule in a case involving the Illinois lessor-lessee statute where the lessor sought to avoid responsibility for the negligence of its lessee upon the grounds that it had, by the lease, lost control of its road and operations, said (l. c. U. S. 421):

> "* * * A complete answer to this suggestion is that by the settled law of Illinois at the time the injury in question was received the lessor company of Illinois, although it had ceased to operate the road, was liable with the lessee company in such an action as this. The cause of action arose in Illinois, and it was entirely competent for that State in the exercise of its governmental powers to say that one of its own

corporations, operating a railroad within its limits, by its authority, shall not, by leasing its road and property, be freed from liability for damages for which it would have been legally liable under its charter had it not made such lease."

The court there went on to point out that the injured party could sue the lessor and lessee jointly or severally at his option under the Illinois law.

The Supreme Court of Missouri, therefore, in holding the Terminal liable for the negligence of the Frisco under Missouri law was exercising the power recognized by this court to determine that matter. The writ of certiorari should therefore be denied.

C.

Terminal Concedes Joint Liability for the Death of Graham and Therefore Respondent Graham Had the Option to Sue Either Terminal or Frisco Separately or Both Jointly at Her Option and Recovery Against Terminal in This Suit Should Not Be Disturbed.

This is concededly a negligence case. It clearly appears that Terminal even now concedes joint, as opposed to single, liability for Frisco's negligence. It is thus in the position of a joint tort feasor against whom plaintiff can file alone or jointly, although but one satisfaction of any judgment could be obtained. *The right of reimbursement or contribution between these railroads is not presently the concern of this or any other court.*

While joint tort feasors in the conventional sense are both negligent and their negligence contributes to cause the injury, where there is a joint liability the fact that one of the wrong-doers may not for some reason be held accountable does not operate to exempt the other. This rule is stated in 62 C. J., Torts, Sec. 49, page 1136, as follows:

> "When the liability is joint, each wrong-doer is responsible for the entire damage sustained, and the fact that one of the wrong-doers may not be held accountable to the injured party will not operate to exempt the other."

There is abundant Missouri authority in conformity with this general rule. In *Berry* v. *K. C. Public Service Co.*, 341 Mo. 658, 108 S. W. 2d 98, the Supreme Court said (l. c. S. W. 102):

> "The right to sue two or more alleged joint tort-feasors jointly or singly in one or more actions, is solely with plaintiff."

Again in the case of *Stith* v. *J. J. Newberry Co.*, 336 Mo. 467, 79 S. W. 2d 447, the Missouri Supreme Court applied this rule to a suit for personal injuries brought originally against the company and its manager, Johnson. The trial court sustained a demurrer to the evidence as to Johnson and upon appeal the court said (l. c. S. W. 462):

> "* * * As any one of the tort-feasors may be sued singly or in connection with any other tort-feasor, the defendant can never object that another tort-feasor was not sued or that the case had been dismissed against him. * * * If therefore the record here sufficiently, though defectively shows a non-suit or dismissal as to defendant Johnson, what right has defendant Newberry company to complain?"

See also: *Taylor Water Co.* v. *Dillard*, 29 S. W. 662, 9 Tex. Civ. App. 667. *Rice* v. *Coolidge*, 121 Mass. 393, 23 Am. Rep. 279.

Likewise, the contractual relationship such as existed between the Terminal and the Frisco here can give rise to joint liability for negligence of one or the other (62 C. J., Torts, Sec. 46, p. 1135):

> "Persons may be jointly liable for the commission of a tort by reason of a contractual relation existing between them. Thus, by reason of their contractual relation such persons may be jointly liable as * * * principal and agent * * *."

We have previously pointed out that the Frisco occupied the position of agent for the Terminal, certainly it cannot be denied that they were both jointly interested in the operation of the Terminal facilities with reference to the Frisco train. In fact the evidence showed that the Frisco was a part owner of the Terminal. Therefore, under the general law the Terminal would be responsible for the negligence of the Frisco. The rule has been thus stated, 45 C. J., Negligence, Sec. 476, p. 897:

> "* * * Where two persons have entered upon a single understanding together, both are liable for an injury resulting from the negligence of one carrying it out."

This court in the case of *Chi., B. & Q. R. Co.* v. *Willard,* 220 U. S. 413, 55 L. Ed. 527, in discussing the joint liability which arose between a lessor and lessee railroad under the Illinois statute said (l. c. U. S. 424):

> "It is thus made clear that if the plaintiff had any cause of action on account of the injury in question he could bring a joint action in an Illinois court against the lessor, lessee companies. Whatever liability was incurred on account of the death of the plaintiff's intestate could at the plaintiff's election be asserted against both companies in one joint action or at his election against either of them in a separate action."

The reasons given by the Supreme Court of Missouri for the reversal of the judgment as against the Frisco were not based upon the fact that the Frisco was not negligent or jointly responsible for that negligence along

with the Terminal, but solely upon the basis that no suit could be maintained against it under the Federal Employers' Liability Act because it was not the employer of Graham. It, in effect, held that the Frisco (a joint tort feasor) had a defense to the action, which was not available to the Terminal, entirely separate and apart from any matter of joint responsibility for negligence. This court has approved the doctrine that even though joint responsibility exists one of the defendants may be relieved from responsibility by reason of a defense such as a release, the bar of the statute of limitations, or some incapacity which prevents recovery against him, but which bar or defense does not extend to or protect his joint tort feasor. In the case of *Chi., B. & Q. R. Co.* v. *Willard*, 220 U. S. 413, l. c. U. S. 424:

> "In *Powers* v. *Chesapeake & Ohio R. Co.*, 169 U. S. 92, 96, 97, which was an action against a railroad company and several of its servants for negligence resulting in an injury alleged to have been caused by the joint negligence or carelessness of all the defendants, the court, speaking through Mr. Justice Gray, said:
>
> '* * * A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. *A separate defense may defeat a joint recovery* but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject matter of the controversy and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings' " (Italics ours).

The end result reached from these authorities is that there exists no right on the part of the Terminal (whose joint liability is admitted by it) either to require a joint or several suit in the beginning or to object to the relief granted by the Supreme Court of Missouri to its joint

tort feasor because of the separate and distinct defense enjoyed by it and not the petitioner. It must be assumed by this court in this proceeding that upon reconsideration the Supreme Court of Missouri would be forced to the same conclusion as to the Terminal's responsibility and, therefore, the writ of certiorari should be denied.

CONCLUSION.

This respondent, therefore, respectfully requests the court to deny the writ of certiorari for the reasons that the petitioner did not properly assert a federal question below, the decision of the Supreme Court of Missouri was not based upon a federal question, its decision was not in conflict with any controlling decisions of this court, the granting of the writ, a hearing before this court and reconsideration below would not change the results reached by the Supreme Court of Missouri as to the liability of the Terminal and this court's opinion would be in the nature of an advisory opinion with reference to state law.

Respectfully submitted,

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